THE

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Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Indian Appeals:

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

REPORTED BY HERBERT COWELL, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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ERRATA.

Page	*Line*	*For*	*Read*
27	7 from the end	Sir Barnes Peacock	Sir Richard Couch.
127		Lord Vano	Lord Vaux.

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JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HER MAJESTY IN COUNCIL

1884.

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Held, on the evidence, that the heba in the cause was a covinous instrument, not made *bonâ fide* or on any good consideration, and was one by which creditors had been delayed in their just rights (the intention of the settlor being to protect his property from those who were his creditors at the time): and that the same according to equity and good conscience was fraudulent and void as against creditors. *Abdool Hye* v. *Mir Mohamed Mozuffer Hossein* 10

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The Court of Wards having appointed a manager on behalf of the infant Plaintiff, *held*, that the Plaintiff having a right to sue, any objection to the manager's authority was only a formal one, and could not be raised in appeal before their Lordships. *Baboo Hurdey Narain Sahu* v. *Pundit Baboo Rooder Perkash Misser* 26

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CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

AJUDHIA BUKSH AND ANOTHER . . . PLAINTIFFS;

AND

MUSSAMUT RUKMIN KUAR AND GUJADHAR BUKSH . . . . . } DEFENDANTS.

J. C.*
1883
Nov. 17.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Construction of Will—Failure of Life Estate—Acceleration of Gift in Remainder—Registration of Will—Act I. of 1869, *s.* 13.

Held, that a gift in remainder expectant upon the termination of a life estate is accelerated and not destroyed by reason of the gift of the life estate being void.

Lainson v. *Lainson* (1) approved.

Quære, whether a widow of an *Oudh* taluqdar is by virtue of her right to maintenance a person who would have succeeded to an interest in his estate within the meaning of Act I. of 1869, sect. 13, clause (1), so that an unregistered will would operate in her favour.

APPEAL from an order of the Officiating Judicial Commissioner of *Oudh* (August 17, 1880), affirming an order of the District Judge of *Lucknow* (March 13, 1880).

* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

---

(1) 5 De G. M. & G. 754.

J. C.
1883
AJUDHIA BUKSH v. MUSSAMUT RUKMIN KUAR AND GUJADHAR BUKSH.

The question was as to the succession to the taluqdari of *Tirbadigunga*, of which the deceased Rajah had obtained a sanad dated the 29th of October, 1860, his name being entered in List 3 prepared under Act I. of 1869.

The Appellant, *Ajudhia Buksh*, was his eldest son and heir-at-law under the Mitakshara, and claimed to succeed under the provisions of Act I. of 1869.

The Rajah, however, left a will dated the 30th of April, 1875, as follows:—

"I, Raja *Thakur Singh Tirbedi*, am talukdar sanad-holder of taluka *Tirbediganj*, tahsil *Haidargarh*, district *Bara Banki* in *Lucknow* Division.

"Whereas I have, up to this day, been loyal to both the Native and British Governments, and preserved a good name under both; have been loyally performing the duties appertaining to me, and have never failed in them; nay, even now I am in receipt of a pension from the Government; and whereas, by favour of both the Governments, I have acquired, by personal exertions, this entire estate of *Tirbediganj* and other villages, landed property and promissory notes, as detailed below, together with all moveable and immoveable property; and I hold and possess all of these without having any co-sharer or a co-parcener therein, up to the time of this writing; and nothing of the above property is ancestral; it has been acquired with great pains and industry. I therefore desire that this my estate may continue intact. But I am sorry that I have married four times: my first wife being *Rani Hans Kuwar*; second, *Rani Biranj Kuwar*, deceased; third, *Rani Phool Kuwar*, deceased; and fourth, *Rani Rukman Kuwar*, still living, each of whom has children; but none of the sons is so able and efficient as to be able to protect the estate and preserve my name after me. On the contrary, when during the mutinies the rebels plundered my property that was within the house at *Lucknow*, the sons of *Rani Hans Kuwar*, my first wife, took all my property, such as was in the house at *Tirbediganj*, and turned my mortal enemies, but, by the grace of God, and the happy associations of the Government, my life was preserved. I no longer approve of the unregistered will, which I formerly executed in favour of *Raja Dabi Buksh*, son of *Rani Phul Kuwar*,

during the summary settlement, in accordance with a call from Government to make a will: I, therefore, actuated by the desire of insuring the protection of my estate, and the preservation of my name, do, while in full possession of my senses and mental faculties, of my own free will, and without coercion, hereby giving away and granting all my Ilaka estate, all notes, goods, cash, jewellery, all documentary papers, the sanad granted by the Government, all property small and large, moveable and immoveable, acquired and possessed by me, to *Rani Rukman Kuwar*, my fourth wife, make her owner and proprietress of all: provided that after my death, *Rani Rukman Kuwar* having held and possessed all my property, her descendants shall, generation after generation, carry out the provisions of this will, and after paying up the expenses mentioned herein, apply the remainder of the profits to their own use. They have no authority to do otherwise. And *Raja Gajadhar Baksh*, son of *Rani Rukman Kuwar*, being of under age, shall, when he attains the age of majority, carry on the work of management, with the advice of the aforesaid *Rani*; and after the said *Rani* he shall be the heir to and representative of the estate, &c., each and everything. No one else can put forward any claims. Should any person do so, his claim will be declared null and void. But none of my representatives and heirs shall have power to do anything against the provisions of this document."

"No one, except *Rani Rukman Kuwar* and her children, can be my heirs and representatives. Should any person claim and raise disputes, let such claim be declared null and void by the Court established by Government."

The Respondent, *Rani Rukmin Kuar*, obtained possession of the talukdary on the death of her husband in December, 1875, and on the 9th of December, 1879, the Appellant (joining as co-Plaintiff the purchaser from him of a six-anna share in the estate) sued to recover possession. The Respondents pleaded the will, which was unregistered, and the material issue was:

2. Is the will invalid under sect. 13, Act I. of 1869

(*a.*) with regard to the widow;

(*b.*) with regard to *Gujadhar Baksh*, her son.

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The judgment of the Officiating Judicial Commissioner was as follows:—

"The case is one of some importance, but the issue is very narrow; it is simply whether, with reference to clause 1, sect. 13, Act I. of 1869, the will in favour of the widow is invalid, owing to non-registry under the special proviso in the section above quoted?

"The Revenue authorities accepted the will as valid, being of opinion that registration of a will in favour of a widow was not necessary.

"The Court of first instance in its judgment notes—'All the widow would have had, if the Rajah had died intestate, would have been a right to maintenance; and there may be room for doubt whether, by strict Hindu law, this right to maintenance could literally be held to be an interest in the estate to which she could have succeeded. I cannot, however, think that the framers of the law intended to limit the meaning of the term, "would have succeeded to an interest in the estate," so strictly as to exclude a widow even in the presence of male issue,' &c.

"And the Judge, I think with some hesitation, found that the registration of a will in favour of a widow, even though there were male heirs, was not imperative under clause 1, sect. 13, Act I. of 1869.

"The main plea in appeal is, that the Judge has overlooked the distinction between succession and maintenance, which are widely different under Hindu law, and which are separately treated throughout the Act, of which chapter 8 is that relating to maintenance. A wife is, under Hindu law, in a subordinate sense, a co-owner with her husband, and, to a certain extent, her position is no doubt different from that of ordinary heirs; and, on referring to the statement of objects and reasons of this Act, published in the *Government Gazette*, I find that the intention of the corresponding section of the bill was to render invalid a gift or will of a talukdar in favour of any person not being the legal heir, or the person who would have been the legal heir if the Act had not been passed, unless the deed was duly registered.

"Sect. 13, Act I. of 1869, is slightly altered, though more in

arrangement than substance, from sect. 12 of the Bill. It seems to me that in both the provisions are obviously less stringent than in the statement of objects and reasons, and that the Courts must be guided by the Act as passed.

"The Judge has held, as above stated, that a widow who gets maintenance from a taluka must be considered to have succeeded to an interest in it under clause 1, sect. 13, Act I. of 1869, and consequently registration is not necessary to validate a will in her favour. And though I think the question is a difficult one, still, after hearing the arguments, and giving the case careful consideration, I am not prepared to set aside the finding of the Court of first instance. I therefore dismiss the appeal; but, as the case is a peculiar one, and Plaintiff would have been the legal heir if this Act had not been passed, I direct that the costs in this Court be borne by the estate."

Cowie, Q.C., and *C. W. Arathoon*, for the Appellants, contended that according to the true construction of Act I. of 1869, sect. 13, a will in favour of the widow required registration. She was not a person who would have succeeded to the estate or an interest therein within the meaning of that section, such as would enable her to take under an unregistered will. The will, therefore, was void as regards her, and accordingly the estate was undisposed of, at least during her lifetime, and the heir-at-law was entitled to immediate possession. It is, however, a technical rule of English law that one estate must support another, and if the first is bad, the ulterior one is bad also.

Cowell, for the Respondents, contended that the widow would have succeeded to maintenance both under the Act and under the general law, and that that was the only interest, as distinct from the estate or a share, that the widow or any one else could take by succession. But even if the gift to her failed, intestacy did not result either in whole or in part. The gift in remainder was accelerated: see *Lainson* v. *Lainson* (1); *Jull* v. *Jacobs* (2).

Cowie, Q.C., replied.

(1) 5 De G M & G 754 (2) 3 Ch D. 703.

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The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

Their Lordships are of opinion that, upon the principle laid down by Lord Justice *Turner* in the case of *Lainson* v. *Lainson* (1), to which they have been referred by Mr. *Cowell*, even if the widow was not a person who would have succeeded to any interest in the estate if the Rajah had died intestate, the son's estate was accelerated. That being so, without expressing any dissent from the opinion expressed by the learned Judges of the Court below, their Lordships are of opinion that, upon the legal construction of the will, the Plaintiff has no valid claim to any interest in the estate.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal should be dismissed, and the decision of the Judges of the Lower Court affirmed. The Appellant must pay the cost of the appeal.

Solicitor for the Appellant: *T. L. Wilson.*

Solicitors for the Respondents: *Barrow & Rogers.*

(1) 5 De G. M. & G. 754.

BURJORE AND BHAWANI PERSHAD . . DEFENDANTS; J. C.*

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MUSSUMAT BHAGANA . . . . . PLAINTIFF. Nov. 22, 23.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, OUDH.

Practice—Extending Time for giving Security—Act X. of 1877, s. 602.

Case in which it was held on the evidence that by family and tribal custom the grandmother of the deceased was entitled to succeed in preference to the male descendants collateral to her husband.

Act X. of 1877, s. 602, with regard to extending time for giving security in appeal, is directory only, and although not to be departed from without cogent reason, *held*, that the Judicial Commissioner exercised a right discretion in doing so when delay had been satisfactorily accounted for.

APPEAL from a judgment of the Judicial Commissioner (Oct. 29, 1880), affirming a judgment of the District Judge of *Lucknow* (July 8, 1880) in favour of the Respondent.

The facts appear in the judgment of their Lordships.

J. H. Arathoon, for the Appellants.

Sykes, for the Respondent.

A preliminary objection was taken on behalf of the Respondent that the Judicial Commissioner had wrongly and without jurisdiction extended the time limited by law for deposit of security for costs by the Appellants. The Judicial Commissioner acted under sect. 602 of Act X. of 1877, and *In re Lala Gopi Chand* (1).

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER :—

This was a suit brought by *Mussumat Bhagana* against the

* *Present* :—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, and SIR ARTHUR HOBHOUSE.

(1) Ind. L. R. 2 Calc. 128.

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Defendants for the purpose of recovering a certain mouzah. The only question in the case was this, whether the Mussumat, who was the grandmother of one *Pirthi Pat*, succeeded to the real property of *Pirthi Pat*, or whether the male descendants collateral to her husband succeeded to that property? The parties were both represented by counsel, and they agreed to this issue: "Is Plaintiff, as a female, excluded from inheritance by the custom of the family and tribe? On Defendants." It appears to their Lordships that, this issue having been settled by the learned Judge by the consent of counsel, and the cause having been tried upon it, it is the only issue now before us; and the question to be determined is whether, the two Courts, that of the Subordinate and of the Judicial Commissioner, having found as a fact that the Defendant had not sustained the burden of proof laid upon him, viz., that the Plaintiff, as a female, was excluded from the inheritance, that finding shall or shall not be affirmed.

The question of the custom or no custom in the family is substantially one of fact. If their Lordships could see that any proposition of law was mixed up with it they might be disposed to review it, but no such proposition arises upon the evidence, and further, they are disposed to say that the conclusion of the Courts upon the evidence seems to them to have been right. The evidence was in substance that of a great number of members of the family, and strangers, of whom more might have been called, to the effect generally that there was such a custom in the family, which is a mere assertion by the witnesses of the question to be tried in the cause. But it would appear that all the witnesses founded their opinion upon one particular case; viz., that upon the death of *Baijnath*, the father of the husband of the Plaintiff, instead of his widow or mother taking, his uncles and nephews took. The Courts say that that being the only instance in the family does not sufficiently prove custom. Further it is to be observed that that evidence was in a great degree contradicted by a paper called a "wajibularz," which was put in, whereby the general contention of the Defendants, which was that no female whatever could succeed, was, to a certain extent at all events, modified. The wajibularz is in these terms: "If the deceased have two or more wives, lawfully married, then

the property left by the deceased would be divided among the number of wives in this way: that if there be one son from one wife, and two or more from the other, then the one son from the former would take one half, and the two or more from the latter would take the other half, subdividing it equally among themselves; but a wife having no male issue shall receive no share; she shall, however, receive maintenance from the sons of the other wives who have inherited a share. In our family the custom is to give no share to daughters. If none of the wives lawfully married to a deceased co-sharer have any issue, in such a case of course the childless widow shall have possession of the share of the deceased. If a widow being childless desire to adopt a son, she can adopt one of the nearest male members of her deceased husband's family. She shall not be competent to adopt her brother or brother's son. Women not lawfully married, and their issue, provided they bear good moral character, will be entitled to receive only food and clothing, but shall not receive a share." This wajibularz seems very much indeed to qualify the general statement of the witnesses that no female could succeed in the family; for it distinctly states that under some circumstances wives and widows succeed, although it does not distinctly state that grandmothers do.

On the whole, therefore, it appears to their Lordships that the finding upon this one issue, which was settled by both the parties and by both Courts, is right.

It should be stated that it appears in this case that *Pirthi Pat* had a daughter about seven years old, but by consent of both parties that daughter is excluded from consideration in the case; and the case has been treated as if that daughter had not existed. Their Lordships think it right to say that that daughter, being no party to this suit, is in no way bound by this decision, and they give no opinion with respect to what her rights may be.

Under these circumstances their Lordships are of opinion that the judgment appealed from was right; and they will humbly advise Her Majesty to affirm that judgment with costs.

It only remains to state that a preliminary point was raised as to whether the Judicial Commissioner had a right to extend the time for giving security in this appeal. Their Lordships upon

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that point have to say that they concur in the view which was taken by the Full Bench of the Court in *Calcutta*, that the words in the Act which have been quoted relating to the giving of security are directory only; and, although not to be departed from without cogent reason, in this particular case it seems to them that the Commissioner has exercised a right discretion. Under these circumstances their Lordships do not give weight to the objection against the admission of the appeal.

Solicitors for appellants: *Young, Jackson, & Beard.*
Solicitors for respondent: *Van Sandau, Cumming, & Armitage.*

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ABDOOL HYE . . . . . JUDGMENT DEBTOR;

AND

MIR MOHAMED MOZUFFER HOSSEIN AND ANOTHER . . . . . } DECREEHOLDERS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

13 *Eliz. c.* 5—*Fraudulent Conveyances as against Creditors—Covinous Instruments void in Equity and good Conscience.*

Whether or not 13 Eliz. c. 5 (which may not extend to or operate in the Mofussil in *India*) is more than declaratory of the common law so far as it avoids transactions intended to defraud creditors, there seems to be no doubt that its principles and the principles of the common law for avoiding fraudulent conveyances have been given effect to by the High Courts of *India*, and have properly guided their decisions in administering law according to equity and good conscience.

Held, on the evidence, that the heba in the cause was a covinous instrument, not made *bonâ fide* or on any good consideration, and was one by which creditors had been delayed in their just rights (the intention of the settlor being to protect his property from those who were his creditors at the time); and that the same according to equity and good conscience was fraudulent and void as against creditors.

APPEAL from an order of the High Court (April 23, 1880) which varied an order of the Judge of zillah *Dacca* (May 9,

* *Present:*—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

1878), and gave the execution creditors a larger right of execution against certain of the properties in suit than the First Court had done.

The broad question at issue, was, whether those properties, which admittedly had at one time belonged to the deceased judgment debtor, had ceased so to belong in his lifetime, by virtue of certain conveyances which the execution-creditors alleged to be merely colourable and executed for the purpose of defrauding creditors.

The Courts below concurred in holding that those conveyances were, in fact, colourable and fraudulent, but the zillah Judge was of opinion that, in the absence of an express Indian enactment for setting aside fraudulent conveyances, such as exists in *England*, they could not be set aside, even by a *bonâ fide* creditor. He referred to the case of *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon* (1).

The High Court was of opinion that such fraudulent conveyances were not good against creditors, and that as in fact the lands in question continued to be the property of the judgment debtor down to his death, they were liable, after his death, to be sold in execution of a decree obtained against him in his lifetime.

The facts are stated in the judgment of their Lordships.

C. W. Arathoon, for the Appellant.

Doyne, and *W. A. Hunter*, for the Respondents, were not called on.

The judgment of their Lordships was delivered by

LORD FITZGERALD:—

It is fortunately unnecessary to state in detail the complicated transactions and the very protracted litigation which characterise the case now before their Lordships. The present proceeding relates to the execution of a decree against *Moulvi Abdool Ally*, obtained so far back as 1866 by some of the representatives of his

(1) Law Rep. 2 Ind. Ap. 87.

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deceased wife *Ifthakharunnissa*, and in respect of which a very considerable sum is still due.

The main question for consideration is whether certain property which the decree-holders have attached, and which they seek to sell, formed part of the assets of *Abdool Ally* at the time of his death, and liable to his creditors; and the answer to this question depends on whether a certain hebanama dated the 19th of Assin, 1256 (October 4, 1849), made by *Abdool Ally* in favour of his son, *Wahed Ally*, is benamee, or is fraudulent and void as against his creditors; and in order to determine these questions, it is necessary to examine the position of *Abdool Ally* and the condition of his family when that gift was executed.

Abdool Ally was a zemindar, and prior to 1849 had married twice, first *Ifthakharunnissa*, and secondly, *Nooronissa*, by whom he had a son, *Wahed Ally*, and a daughter.

In October, 1849, he was under a considerable liability for the dower of *Ifthakharunnissa*, so large that after her decease two of her representatives (the present decree-holders) obtained a decree as for their share for Rs.62,000.

He was in 1849 the owner of a variety of small properties, collectively of considerable value, but probably not more than sufficient to enable him to meet his engagements, and being thus situated, he appears, voluntarily and without any consideration, to have made the hebanama of the 4th of October, 1849.

That instrument is as follows:—

"To the worthy of remembrance,

"*Sriman Meah Wahed Ally*, of good behaviour.

"Deed of gift of jumma lands executed by *Moulvi Abdool Ally*: As it is known that in such times as these there is no certainty of any man's life, and as I am now past fifty-five years of age, and that I have only you, my minor son, and a daughter, *Srimati Fukurunnissa Khatoon*, who is now without husband or offspring now in existence; and as on my death it would not be to be wondered at that you and your sister should fall to quarrelling about the property left behind by me; and as my daughter aforesaid having had from her husband zemindaries and talooks, many properties, and is therefore well provided for, and I having already bestowed by regular deeds some of my property to my wife *Srijuta*

Noorunnissa Khatoon, and being in undisturbed possession with full rights of the remainder of the zemindaries and talooks which I own and possess" (the properties are here enumerated), "I of my own free will and pleasure, being in sound health and of my full knowledge, and as it would be difficult for you to live well and comfortably without my giving you all those talooks and zemindaries, do hereby confer upon you the above-mentioned 10 annas, 13 gundas, 1 cowri, 1 krant share of pergunnah *Noorool-lapore*, and the 7-anna share of pergunnah *Idrakpore* in separate and respective shares, and in pergunnah *Chunder-dip*, the kharija talooks of jowar *Lalwa Banekachi*, in their entirety, and I cause you to be put in possession thereof: You shall therefore enjoy possession of all dwelling grounds, garden lands, cultivated and waste lands, homesteads, orchards, churs and sandbanks, new formations and re-formations, roads and pasturages, with trees, rivers and watercourses, ponds and tanks, water and forest privileges, and proceeds of fruits, hauts, markets, ghâts (river crossings), bazaars and all matters therein connected with the said talooks and zemindaries, with tenants, zaerats, talookdars, howladars, and all other rent-holders, rents in their entirety, to excavate or to fill up, to settle thereon dwellings, plant orchards and gardens, and by collections of the revenues and by a transfer from the former names to your own of all those talooks and zemindaries, at the office of the Collectorate, and becoming full owner in right of me, with power to give or to sell, and you and your heirs in succession shall enjoy possession thereof, and the rights of myself and my heirs therein are hereby abandoned and cease. To which effect I have executed this deed of gift.

"Dated the 19th Assin, 1256."

This grant appears to have been duly registered; but the instrument remained in the hands of *Abdool Ally*, and never appears to have been in possession of or under the dominion of the grantee.

Wahed Ally was then but ten years of age, and his father, *Abdool*, continued in the possession and apparent ownership of the property granted, and took and received and applied to his own use the whole of the income and profits. He appears to have continued in such possession to the time of his death.

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The property comprised in the gift seems to have been substantially the bulk of *Abdool's* then assets; and certainly, if that gift was to take effect, he left himself without the means of meeting his then existing liabilities.

The gift was not followed or completed by any actual change of possession or of management or apparent ownership.

On the 24th Jeyt, 1258 (6th June, 1851) *Nooronissa*, the second wife of *Abdool* and mother of *Wahed*, also executed a hebanama in favour of her son *Wahed* of considerable property obtained from her husband *Abdool* or inherited in her own right; but no question arises on this instrument in the appeal now before their Lordships.

Wahed being still a minor, and shortly before he attained eighteen, was made to sign two ikrars, both dated 29th Falgoon, 1259 (11th March, 1853). That from *Wahed Ally* to his father recites the hibba of the 19th Assin, 1256 (4th October, 1849); and that, his father, mother, and "half-mother" being alive, full brothers and sisters and half-brothers and sisters might be born to him. After further reciting that as *Abdool*, by reason of his gift to *Wahed*, was unable to make suitable arrangements for their maintenance, it became incumbent on him to do so out of the property received by him in gift, it then contains an agreement by *Wahed* to maintain his sister *Fukhurunnissa*, and any other sisters or half-brothers to be afterwards born in joint mess during their minority, and on their coming of age to allow them certain fixed stipends for maintenance. He also agreed, in case any full brothers should afterwards be born, that he and they, subject to such allowances, should enjoy the properties in equal shares. These words follow this disposition:—"And thus I do make my brothers and sisters co-sharers in the property received by me in gift and the profits thereof." The ikrar concludes by declaring that during the father's lifetime the whole of the property named in it will remain in the father's charge, and under his management and control.

Some time after the signing of these ikrars *Abdool* married *Amirunissa*, mother of the minor Appellant.

After *Wahed* attained eighteen he signed a third ikrar dated the 16th Aughran, 1263 B.E. (30th November, 1856), in which.

after reciting the two hibbas from the father and mother, it thus refers to the two former ikrars,—"That I being your only son, and on account of your having no other son possessed of all your affections, you had, so as to prevent that any disputes could arise with any one in future, bestowed upon me, by your favour, and through the execution of a deed of gift dated the 19th Assin, 1256, your ancestral zemindaries, specified in the schedule. Besides this, having settled upon my late mother, *Noorunnissa*, as her marriage dower, your zemindary of tuppah *Hawali Jehanabad*, and your talooks, &c., my mother aforesaid as the owner thereof bestowed them upon me through a deed of gift dated the 24th Joistee, 1258; and I being the owner and in possession of that property, worth, in accordance with the deed of gift, Rs.80,000, I did formerly give and execute, as addressed to you and to my mother, separate ikrars (agreements), to the effect that all the properties named in the schedule of the aforesaid deeds of gift and other properties should during your lifetime remain under your control and in your possession. That I did not possess the right of sale and gift over that property, and that should uterine brothers to me be born the property received in gift from my mother should be enjoyed by all of us in equal shares, and promising should I have sisters or half-brothers and sisters, to make monthly allowances to them." It then recites that the father had contracted a marriage with *Amirunnissa*, who is stated to be a lady of good family, that provision had been made for the children of the former marriages by the earlier ikrars, and that it was proper to make some provision for her and any children to be born of *Amirunnissa*. It then states an agreement by *Wahed* to make allowance to the daughters of the marriage, and that should any sons be born, they, his half-brothers, should enjoy the property with him in equal shares, adding, "and thus I constitute my brothers and sisters sharers in the property and in the profits thereof." *Wahed* then grants an allowance to *Amirunnissa* of Rs.150 per month for her table, and Rs.500 a year for her clothes. The ikrar contains a statement that the father was in possession of the property by virtue of the former ikrars, and concludes by declaring that it will remain in his control and management

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during his lifetime, and that neither *Wahed* nor his heirs should interfere or lay any claim thereto.

Soon after this last marriage of *Abdool Ally*, disputes arose in the family, which resulted in a suit being filed in 1859 by *Wahed* against his father, to obtain possession of the properties conveyed to him by the hibbas, and to have it declared that the said ikrars were not executed by him but were forged documents.

Abdool Ally's defence to this suit was that the hibbas had not been executed *bonâ fide*, but for the purpose of diminishing his credit.

Pending the litigation *Wahed* died in August, 1866, and *Abdool* died in June, 1867, leaving his widow *Amirunnissa* and her two sons, the Appellant *Abdool* and his brother *Lotif*, surviving; *Lotif* died soon afterwards.

After the death of *Abdool* the decree holders sought execution against his assets, and, *inter alia*, against parts of the property included in the hebanama of 19th Assin, 1256 (4th Oct. 1849), which they contend is benamee; that is to say, they allege that it was a transaction not intended to operate according to its tenor and effect, but merely as a cover from creditors, and further that it was fraudulent and void against creditors. If they are correct in those contentions that instrument cannot stand in their way; the property remained the property of *Abdool*, and the ikrar under which the Appellant claims is equally inoperative against them.

Their Lordships pass by a mass of litigation and a labyrinth of complicated questions which arose from time to time between the parties, and which will be found clearly described in the judgments pronounced from time to time in the progress of the cause by Mr. Justice *Mitter* and other Judges, and their Lordships desire to confine their observations to the questions which arise on this appeal.

The questions which their Lordships have to determine are whether the gift of 1849 was one of those known as a benamee transaction, or was it otherwise fraudulent and void as against the decree-holders, whose decree was obtained in respect of a pecuniary liability existing at the time of the grant and still undischarged.

Their Lordships have considered those questions quite irrespective of the statements or declarations made by *Abdool post litem motam* in the litigation between him and *Ahmed*, and where his object was to defeat his own deed.

On a fair and full consideration of the state of circumstances existing at the time of that heba, and the course of conduct pursued afterwards, their Lordships are clearly of opinion that it was benamee to this extent—that it was a mere pocket instrument, not intended to operate according to its tenor and effect, but by which property was put in the name of *Wahed* but for the benefit of *Abdool*.

The possession remained with *Abdool*, and he appears during his life to have acted as uncontrolled owner and for his own sole benefit. There is some remarkable documentary evidence too, from which it appears that after the heba, there having been from time to time accretions to the lands comprised in the heba, and which according to the law of *India* follow the principal, those accretions were claimed by *Abdool;* and he obtained grants of them to him and his heirs.

The heba was not, and could not, be dealt with as a family settlement; there does not appear to have been any occasion for it, and the grantee was a boy of ten, who is afterwards made to sign an ikrar, by the concluding provision of which it is declared that the property is to remain in the control and management of *Abdool* during his life, and that neither *Wahed* nor his heirs should lay claim thereto.

But supposing the heba to be operative as between the parties, their Lordships have still to consider whether it is to be upheld as against creditors.

By statute of 13 Eliz. c. 5, all covinous conveyances, gifts, and alienations of lands or goods whereby creditors might be in anywise disturbed, hindered, delayed, or defrauded of their just rights, are declared utterly void.

Whether or not that statute (which may not extend to or operate in the Mofussil in *India*) is more than declaratory of the common law so far as it avoids transactions intended to defraud creditors, there seems to be no doubt that its principles and the principles of the common law for avoiding fraudulent conveyances

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have been given effect to by the High Courts of *India*, and have properly guided their decisions in administering law according to equity and good conscience.

Mr. Justice *White*, in delivering the judgment of the High Court, observes:—"What was the position of *Abdool Ally* when he executed the heba of 1849? At that time he had hanging over his head a large liability under the kabinnama, or deed of dower, which forms the subject of the present suit, and which he had executed when he married his first wife *Iftarkharunnissa*. She had died leaving a married daughter, who has since died leaving infant sons. The decree-holders, who are only some of the heirs, claim a 2-annas share of the dower, and have been held entitled to Rs.62,000 odd. The entire liability under the kabinnama was, therefore, not far short of 5 lakhs of rupees."

It is not necessary to adopt the whole of that statement. It is sufficient to say that the liability was very large.

The Judge of the District Court at *Dacca* makes use of the following remarkable language:—"However binding the documents may be as among the parties to them, we are beyond all doubt dealing with a gigantic fraud as regards third persons. Until, however, we get a law directed against voluntary and fraudulent conveyances, we must go on searching in each case for specific proof of fraud, &c.; generally, as now, finding that proof insufficient." But in observing on that passage, Mr. Justice *White*, in the Appellate Court, observes, "If the hebas are found, upon proper evidence, to be a contrivance to defraud creditors, they will not stand in the way of the decree-holders executing their decree against the properties mentioned in the hebas. The statute 13 Eliz. c. 5, which was enacted for the purpose of rendering conveyances in fraud of creditors void, is considered to be in affirmance of the general principles of the law by which fraudulent transactions are liable to be vacated at the instance of those affected by the fraud. This statute has been universally applied within the territorial jurisdiction of this Court on its original side; and whether it has or has not been applied by name in the Mofussil, the principle on which it is founded has been frequently asserted there, and is in accordance both with Hindu and Mohamedan law."

Their Lordships observe then that in the primary Court, where the Judge had the witnesses before him, he treats the transaction as a gigantic fraud as regards third persons.

The Judges of the High Court of *Bengal* arrived at a similar conclusion on the facts of the case. Their Lordships would be slow to differ from these tribunals thus concurring on conclusions of fact, and they do not find it necessary to do so. They have come to the conclusion that the heba of 1849 was a covinous instrument, not made *bonâ fide* or on any good consideration, and by which creditors (the holders of the decrees) have been delayed in their just rights; and taking the whole transaction together, they are of opinion that the intention of the settlor was to protect the property from those who were his creditors at the time.

Their Lordships are of opinion that according to equity and good conscience the heba is fraudulent and void as against creditors, and that the decree appealed from is right and should be affirmed, and the appeal dismissed; and will so humbly advis Her Majesty.

The costs must follow the event.

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for above named Respondent: *Barrow & Rogers.*

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Nov. 9;
Dec. 1.

CHAUDHRI HIRA SING . . . . . PLAINTIFF;

AND

CHAUDHRI GUNGA SAHAI AND AMIN SINGH . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.

Arbitration—Award.

Held, that the Appellant not having been a party submitting to arbitration was not bound by the award, and therefore acquired no interest thereunder, and could derive no right or interest therefrom.

APPEAL from a Full Bench ruling of the High Court (*Spankie*, J., dissenting), dated April 12, 1882, which reversed the order of the District Judge of *Meerut* (May 9, 1879), and restored that of the Subordinate Judge of *Meerut* (Dec. 24, 1877), which latter order directed the suit to be dismissed.

The facts are stated in the judgment of their Lordships.

The suit was brought on the 5th of December, 1876, to recover complete possession after partition of two-thirds of certain properties jointly possessed by the parties.

The question in the suit was as to the right of the Plaintiff, a Hindu, who had admittedly been deaf and dumb from his birth, and therefore by Hindu law was disqualified to inherit, to enforce the right which he claimed, to have partition made as against these Defendants of certain joint premises, and to have separate possession given to him of two-thirds of the same.

The difference between the Courts below has been as to the effect of certain arbitration proceedings in waiving, or otherwise, the admitted original disqualification.

The Subordinate Judge held in effect that as the Plaintiff was not a party to the arbitration, it would be contrary to all rules of equity and law to give him the advantage of the award when he would not have been bound by it if it were unfavourable to him, and that no such admission had been made by the Defendants as

* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

would now preclude them from setting up the Plaintiff's disqualification.

Mr. Justice *Pearson* delivered the following judgment of the Full Bench (*Stuart*, C.J., *Pearson*, *Straight*, and *Oldfield*, JJ., *Spankie*, J., dissenting):—

"The Plaintiff in this suit claimed to obtain separate possession, by partition, of a share which he alleged to belong to him, by right, in certain houses, being ancestral property. The exact nature of his right he did not define. But it is not disputed, and is not open to dispute, that he is not entitled to the share or any share in the property in question by right of inheritance, inasmuch as he was admittedly born deaf and dumb, and is incapable of inheriting property under the Hindu law. The ground on which the Lower Appellate Court has allowed his claim is, that his right as heir to his father's estate was declared by an award, dated the 4th of January, 1875, to which the Defendants in the present suit assented. The Plaintiff was not himself a party to the agreement to refer to arbitration the question who was *Hardial Singh's* heir? and the Judge is wrong in supposing that *Debi Singh*, the Plaintiff's natural brother, agreed to the arbitration as his guardian, and represented him before the arbitrator. The award could only bind the parties to the arbitration, and the Plaintiff, not being a party thereto, is not bound by it, and, not being bound by it, cannot claim to take any advantage from it. It could not confer on him, who was not a party to the arbitration, a right which he did not possess by law, nor can it constitute evidence of a right which the law disallows. The award does not profess to be based on the Hindu law, but rather seems to have been wilfully made in contravention thereof. Nor could the Defendants assent to the award conveying to him a right of inheritance which did not devolve on him by law. The Lower Appellate Court is mistaken, I conceive, in holding that either they or the arbitrator could, by anything done by them in the arbitration proceedings, bestow on the Plaintiff, who was not a party to them, a right which the law had refused to him, the law notwithstanding, and could cure the legal defect in his title. It has been urged, and may be granted, that a person who was not originally a party to arbitration proceedings may subsequently become a party to them, but it does not appear that the Plaintiff

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ever became a party to the proceedings which terminated in the award dated the 4th of January, 1875. Had the award recognised the Defendants' right to the inheritance, they might, doubtless, have made a gift of the property or any portion of it to him; but it seems impossible to contend that they could make a gift of what was adjudged not to belong to them. The circumstance that he may have been allowed to continue, as before, in joint possession of the property, is explained by the consideration that he is, under the Hindu law, though excluded from inheritance, entitled to maintenance. It has been suggested that the Defendants, by their assent to the award, are estopped from questioning the Plaintiff's right of inheritance in this suit by the provisions of sect. 115 of the Indian Evidence Act; but that section, which is understood to embody the rule of the English law, seems to me to be inapplicable.

"'The doctrine of estoppel' (says Mr. Justice *Story*) 'is based on a fraudulent purpose and a fraudulent result. If, therefore, the element of fraud be wanting, there is no estoppel; there must be deception and change of conduct in consequence.' Now it can hardly be contended that the Defendants, in expressing their acquiescence in the award, intended to deceive the Plaintiff, or that he was deceived thereby, and led to take any action which has put him in a different position from that which he occupied before in respect of the property in suit. The Plaintiff then, having no right in him either by the law of inheritance or under the award, or by reason of any conveyance made in his favour by the Defendants, cannot possibly succeed, if they be not estopped from calling his right in question."

Cowie, Q.C., and *C. W. Arathoon*, for the Appellant, contended that the award followed by what was done under it gave the Appellant the right which he claimed. Though disqualified to inherit, he was not disqualified to contract or to take by gift. The award shewed a waiver by the Respondents of the Appellant's disqualification.

Leith, Q.C., and *Doyne*, for the Respondents, contended that the High Court was right in holding that the Respondents had not by submitting to arbitration given up their right of insisting upon the Appellant's disqualification.

Cowie, Q.C., replied.

Dec. 1. The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

This is an appeal in a suit brought by the Appellant against the Respondents for complete possession after partition of two-thirds of six houses and a tank in mouzah *Asaura*, in zillah *Meerut*, the Plaintiff being alleged to be a co-sharer and possessor of two-thirds and the Defendants of one-third thereof.

The Plaintiff is the son of *Hardial Singh*, who had two sons, the Plaintiff and *Debi Singh*. The Defendants are the sons of *Golab Singh*, the uncle of *Hardial*. The Plaintiff's grandfather, *Dharam Singh*, and *Golab Singh* were the sons of *Baji Rai*, whose brother, *Bhore Singh*, had a son, *Hulas Rai*. *Hardial* died in 1871. It did not appear when *Hulas Rai* died. After his death his widow, *Rupkoer*, adopted *Debi Singh*. It was admitted that the Plaintiff was born deaf and dumb, and was consequently, by Hindu law, incapable of inheriting. But it appeared, by a proceeding of the Revenue Court, on the 24th of April, 1872, and an order of the Collector on the 6th of May, 1872, that on the death of *Zalin Singh*, the lamberdar of mouzah *Asaura*, *Hira Singh* was appointed lamberdar under the management of *Debi Singh* with the consent of the Respondents; and an issue in this suit whether *Debi Singh* was in possession, on behalf of the Plaintiff the (Appellant), of any property belonging jointly to the Plaintiff and the Defendants (the Respondents), was found for the Plaintiff by the District Judge.

On the death of *Rupkoer*, the date of which did not appear in the proceedings, disputes arose in the family as to the succession to the property, and to the property of *Hardial*, and, on the 26th of December, 1874, an agreement for arbitration was made between *Amin Singh* and *Gunga Sahai* (the Respondents), *Ram Bukhsh*, son of *Phul Singh* (a brother of *Golab Singh*), *Jawakir Singh*, and *Nawal Singh*, sons of *Ram Dial Singh*, another brother of *Golab*, and *Shadi Ram* and *Khasi Ram*, sons of *Shankar Singh*, the first party, and *Debi Singh*, the second party, whereby, after stating that there was dispute between them "in respect to three matters, (1), as regards the legal heir to the property left by

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Musammat Rupkoer, deceased, (2) as regards the heir now and hereafter to the property left by *Chaudhri Hardial Singh*, and (3) as regards property and documents which stand recorded 'Ismfarzi' between the first and the second parties," they appointed *Chaudhri Zalim Singh* as arbitrator to decide all the aforesaid matters, and declared that if any other matter besides those in dispute should be submitted to the arbitrator, he should have power to decide the same. The submission was signed by *Debi* solely on his own behalf. *Zalim Singh*, by his award, found, as to the first point, that *Rupkoer* had adopted *Debi Singh*, and that he was the lawful heir to the entire property left by *Hulas Rai* and *Rupkoer*. "As regards the second point," he said, "I am of opinion that *Chaudhri Hardial Singh* has two sons, *Hira Singh* and *Debi Singh*, *Chaudhri Hardial Singh* died in 1871, and then the name of *Hira Singh* alone (*Debi Singh* having been adopted by *Chaudhrain Rup Koer*), who, though dumb, was the sole heir, was entered in the column of proprietorship, and he is in proprietary possession of the property, and enjoys the profits thereof. And the parties admit that *Hira Singh* is the heir and exclusive possessor of the property left by *Chaudhri Hardial Singh*, therefore *Hira Singh* should, in my opinion, continue to be the owner and possessor of the entire property, as he is, and that after him his male issue will become owners; that if (God forbid) he may have no such issue, the said property also will devolve on *Debi Singh*, and his descendants will have no right whatsoever to the property left by *Chaudhri Hardial Singh*, moveable or immoveable."

On the third point the arbitrator decided as to some parts of the property which was the subject of it in favour of *Gunga Sahai* and *Amin Singh*. He then stated that the first party had requested that as they had no property near *Asaura*, their place of residence, they should have a portion of *Debi Singh's* property by purchase, which appeared to him to be reasonable; that *Debi Singh* reluctantly and coercively agreed to give certain property mentioned, on receipt of consideration; and he, the arbitrator, by agreement of the parties, had fixed the price at Rs.30,000, which was paid in his presence.

All the parties to the arbitration signed the award in token of their consent to it, and the parties of the first part, on the same

day, executed a razinama, relinquishing all claim to the inheritance and the property. *Hira Singh* did not sign, nor did *Debi Singh* do so on his behalf.

The question in this appeal is, what was the effect of the arbitration and award and razinama as regards *Hira Singh*, it being contended before their Lordships that he acquired an interest under the award, and had a right to insist upon it. The case first came before two of the Judges of the High Court for the *North-Western Provinces* at *Allahabad*, who referred it to a Full Bench. Of the five Judges, by whom it was then heard, four were of opinion that the award could only bind the parties to the arbitration, and the Plaintiff not being a party thereto was not bound by it, and not being bound by it could not claim to take any advantage from it, and that it could not confer on him, who was not a party to the arbitration, a right which he did not possess by law. The remaining Judge was of opinion that the award might be evidence of a family arrangement or cession of claim by the Defendants which might be enforced as against them. Accordingly the suit was dismissed.

Their Lordships are of opinion that the decree of the High Court should be affirmed. It did not appear that *Hira Singh* or any one having authority to act for him in that behalf had consented to be bound by the terms of the award. He was in possession before the arbitration, and continued in possession, and he made that possession and not the award the foundation of his claim to a partition. The award was produced by *Debi Singh*, who was indeed his witness, but who proved that it was signed by *Amin Singh* and *Gunga Sahai*, in answer to a question by the pleader for the Defendants. *Hira Singh* was a stranger to the submission, and was under no obligation to abide by the award, and consequently he could not avail himself of it. Their Lordships will therefore, humbly advise her Majesty to affirm the decree of the High Court, and to dismiss the appeal, and the costs thereof will be paid by the Appellant.

Solicitor for Appellant: *T. L. Wilson.*
Solicitor for Respondents: *W. & A. Rankin Ford.*

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BABOO HURDEY NARAIN SAHU . . . DEFENDANT;

AND

PUNDIT BABOO ROODER PERKASH MISSER AND OTHERS . . . . . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Practice—Formal Objection as to Authority of Plaintiff's Next Friend—Rights of Purchaser of Hindu (Mitakshara) Father's Right, Title, and Interest in Joint Property.

The right, title, and interest under Mitakshara law of a father in the joint family estate having been attached in execution of a decree for money and sold, *held*, that the purchaser took the right which the father would have had to a partition, and the share which would have come to him on a partition being made.

The Court of Wards having appointed a manager on behalf of the infant Plaintiff, *held*, that the Plaintiff having a right to sue, any objection to the manager's authority was only a formal one, and could not be raised in appeal before their Lordships.

APPEAL from a decree of the High Court (April 23, 1881, and Sept. 9, 1881, in review) reversing a decree of the Judge of *Bhagulpore* (July 25, 1877) whereby the suit was dismissed.

The facts of the case appear in the judgment of their Lordships.

The main question was as to the rights in joint family estate, which, under Mitakshara law, accrue to a purchaser of the father's right, title, and interest therein, sold in satisfaction of debts incurred by the father.

Doyne, and *C. W. Arathoon*, for the Appellant, contended that the manager who brought this suit on behalf of the infant Plaintiff had not been properly appointed by the Collector, and that an order in that behalf made by the District Judge was *ultrà vires* under Act XL. of 1858. [SIR RICHARD COUCH:—The point has not been taken in the Courts below, and is purely formal. SIR

* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

BARNES PEACOCK referred to sect. 578 of Act X. of 1877]. There has been no waiver of the defence that it was necessary to see whether this suit was instituted by a person legally competent to do so and represent the minor. [*Mayne*:—He is at least guardian *ad litem*.] See sect. 12 of Act XL. of 1858. The thing sold here was the whole of the eight-annas share. The father was manager of the estate and guardian of the son. His debts, unless contracted for illegal and immoral purposes, bind the estate: *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1); *Girdharee Lall* v. *Kantolall* (2). [SIR BARNES PEACOCK:—Here there was only the father's interest sold, what was it? Has the mother a share?] There is a difference as to that in the three Presidencies. See *Sumrun Thakoor* v. *Chundun Mun Misser* (3); *Badri Roy* v. *Bhugwat Narain Doley* (4). Without a partition a widow could take no title to a share, only maintenance, and a mother can be in no higher position.

Mayne, and *Macrae*, for the above-named Respondent, contended that the Appellant, by his purchase, obtained the father's interest in the eight-annas share, which was an undivided one-third share thereof only. The Respondent was entitled to a decree for possession of the whole eight annas, subject to a declaration that the Appellant had acquired the said undivided one-third share: *Deendyal Lal* v. *Jugdeep Narain Singh* (5).

Doyne replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

Three questions have been raised before their Lordships in the hearing of this appeal. The first was disposed of in the course of the argument. It was this: that the suit was brought by the manager appointed by the Court of Wards on behalf of the infant Plaintiff; and that the manager had not authority to represent the Plaintiff in it. Without considering whether he had

(1) Law Rep. 6 Ind. Ap. 88, 94, 106.
(2) Law Rep. 1 Ind. Ap. 321.
(3) Ind. L. R. 8 Calc. 17.
(4) Ibid. p. 649.
(5) Law Rep. 4 Ind. Ap. 247.

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authority or not, their Lordships were of opinion that, if the Plaintiff had a right to sue, the objection was only a formal one, and could not be allowed to be raised in the present appeal.

The next and the principal question in the case, was, what right or interest in the property which is the subject of the suit was acquired by the Appellant, *Hurdey Narain*, by his purchase at the sale in execution of a decree which he had obtained against the father of the Respondents, *Shib Perkash Misser*. It appears that *Shib Perkash Misser* was indebted to *Hurdey Narain*, partly on account of a mortgage, and partly for further advances; and that *Hurdey Narain* brought a suit against him in order to recover the debt, and obtained a decree on the 4th of March, 1873. The decree was the ordinary one for the payment of the money; and this case is distinguishable from the cases where the father, being a member of a joint family governed by the Mitakshara law, had mortgaged the family property to secure a debt, and the decree had been obtained upon the mortgage and for a realisation of the debt by means of the sale of the mortgaged property. It is a simple money decree, which states that the claim was to recover Rs.6335, principal and interest, and is:—"That a decree be passed in Plaintiff's favour for the amount of claim and interest on the principal for the period pending judgment of the case, and costs with interest on the entire amount, at the rate of eight annas per cent. per mensem from to-day till realisation." The property was attached on the 1st of April, 1873; and the attachment being by an order prohibiting the Defendant from alienating the property, it purported to be, as it must have been, an attachment of the entire eight annas; but what was attached and subsequently sold really was, the right, title, and interest of the father, against whom the decree had been obtained, in the eight annas; and it is clear from the terms of the sale certificate that this is what was sold and purchased by the Appellant. The sale certificate, which was given after some questions had been raised by the father with respect to the regularity of the sale, and the sale had been confirmed by the High Court, which questions it is not necessary to consider,—stated that an application had been made, and the sale proclamation was issued,—"and the said property was on the "5th of August, 1873, sold for Rs.6800; and whatever rights and

interests the said judgment debtor had in the said property were purchased by *Baboo Hurdey Narain*, decree-holder, auction purchaser." It then went on, after speaking of the payment of the purchase-money, to say:—"Therefore this sale certificate is granted to *Babu Hurdey Narain*, decree-holder, auction purchaser; and it is proclaimed that whatever rights and interests the said judgment debtor had in the said property, having ceased from the date of the auction sale, passed to the said decree-holder, auction purchaser." Therefore what was purchased on that occasion were the rights and interests of the father; and this is precisely like the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (1) where their Lordships held that, the purchase being, as it was here, by the person who had obtained the decree, only that passed which the father, the person against whom the decree was obtained, had. The judgment in that case defines what is actually sold. At page 253, speaking of the decision of the High Court at *Calcutta* in the Full Bench case which is so often referred to, their Lordships say:—"So long as *Bhagwan* lived,"—that is, the man against whom the decree was obtained,—"he had an interest in this property which entitled him, if he had pleased, to demand a partition, and to have his share of the joint estate converted into a separate estate." The bond-holder had sued on his bond, obtained a decree, taken out execution against joint property, and become the purchaser of it at the execution sale. The interest which is purchased is not, as Mr. *Doyne* argued, the share at that time in the property, but it is the right which the father, the debtor, would have to a partition, and what would come to him upon the partition being made. That is the answer to Mr. *Doyne's* argument that the father was entitled to a half. What the father was entitled to, and what the purchaser became entitled to, was what the father would get if a partition had been made; which was only a third of the eight annas share. According, therefore, to the authority of *Deendyal Lal* v. *Jugdeep Narain Singh* (1), the present Appellant became entitled only to the one-third, treating it as if the sale was to operate as a partition at that time.

The case of *Deendyal* has been recognised in a subsequent case

(1) Law Rep 4 Ind. Ap. 247.

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of *Saraj Bunsi Koer* v. *Sheo Proshad Singh* (1), in which that decision was acted upon, and which case is also applicable to the present.

The other question which has been raised before their Lordships is this: The High Court, when the case came before it on appeal, —having satisfied itself that the present Appellant by his purchase took only the interest which the father had, and if a partition had been made at the time of the sale the mother would have been entitled to a third, and the son, who was then living, would have been entitled to another third,—directed that the mother should be made a party to the suit, it having been found that the rights of the parties were governed by the Mitakshara law. The mother having been made a party, the High Court then made what in effect is a partition of the property which was the subject of the suit, making a decree that the mother and the son should each recover one-third, leaving the remaining third in the Appellant's possession. After that decree, and pending this appeal, the mother died, and, a second son having been born, the two sons are now parties to this appeal in respect of her share. The question which has been raised is whether the decree which has been made by the High Court ought to stand or not.

According to the judgment of their Lordships in *Deendyal's Case* (2), the decree, which ought properly to have been made would have been that the Plaintiff, the first Respondent, should recover possession of the whole of the property, with a declaration that the Appellant, as purchaser at the execution sale, had acquired the share and interest of *Shib Perkash Misser*, and was entitled to take proceedings to have it ascertained by partition. So that, in fact, the Appellant has got a decree more favourable to himself than he was entitled to. He retains possession of one-third, instead of being turned out of the possession of the whole and left to demand a partition.

Their Lordships, therefore, think that there is no ground for altering the decree of the High Court, although it may have gone beyond what was necessary or proper. The decree is not strictly right, but the Appellant does not suffer by that. He gets all that he would be entitled to if a partition were made.

(1) Law Rep. 6 Ind. Ap. 88. (2) Law Rep. 4 Ind. Ap. 247.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court and to dismiss the appeal. The Appellant will pay the costs.

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Solicitor for the Appellant: *T. L. Wilson.*
Solicitor for the above-named Respondent: *H. Treasure.*

SYED SADAKUT HOSSEIN . . . . . DEFENDANT;

AND

SYED MAHOMED YUSOOF . . . . . PLAINTIFF.

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ON APPEAL FROM THE HIGH COURT IN BENGAL.

Mahomedan Law—Acknowledgment of Son—Legitimacy—Offspring of Adulterous Intercourse.

Case in which it was held that an acknowledgment and recognition by a Mahomedan of his son, with a view to give him the *status* of son capable of inheriting was sufficient to enable him to succeed as heir.

Quære, if the son had been shewn to have been the offspring of adulterous intercourse, that is if his mother had been previously thereto married to another man then and still living, would such acknowledgment and recognition have availed to legitimate him.

APPEAL from a decree of the High Court (June 3, 1880) reversing a decree of the Subordinate Judge of *Sarun* (Dec. 16, 1878), which dismissed the Respondent's suit. The High Court declared the Respondent entitled to the possession of the properties in suit.

The facts are stated in the judgment of their Lordships.

The Subordinate Judge held that *Mahomed Selim* was proved to have been begotten by *Amir Hossein*, and that the presumption which arose of marriage with *Domni*, the mother, from cohabitation and treatment, was not rebutted by the Appellant's counter-evidence, and that therefore *Mahomed Selim* was the legitimate son of his father. Part of that counter-evidence was given to shew that *Domni* was, when *Mahomed Selim* was born,

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the wife of another man. This the Subordinate Judge considered not proved.

The High Court on this issue held that the evidence of marriage was incredible, but concurred with the First Court that *Mahomed Selim* had been begotten by *Amir Hossein*, and treated by him as his legitimate son, and were further of opinion that that being so, it was not necessary to decide whether the Appellant's contention that *Domni* was at the time she bore him to *Amir Hossein* in fact the wife of another man was proved or not.

Leith, Q.C., and *Doyne*, for the Appellant, contended that *Mahomed Selim's* claim to succeed to his father's estate as a legitimate son failed. First, on the evidence there was a previous marriage of *Domni* with *Jummun* which was continuing at the time of the birth of *Mahomed Selim*. Therefore it was not competent to *Amir Hossein* had he so desired to give to the offspring of an adulterous connection the status of a legitimate son: *Khajah Hidayut Oollah* v. *Rai Jan Khanum* (1); *Macnaghten's* Mahomedan Law, p. 61; *Macnaghten's* Precedents, p. 299; *Baillie's* Digest of the Mahomedan Law, book v. 'of parentage,' ch. 1 and 2 'of acknowledgment,' 2nd ed. p. 406 *et seq.*; *Mirza Quaim Ali Beg* v. *Mussamut Hingun* (2); *Ashrufood Dowlah Ahmed Hossein Khan Bahadoor and Another* v. *Hyder Hossein Khan* (3); Hedaya, book xxv. ch. 3. [SIR ARTHUR HOBHOUSE referred to *Nawab Muhammad Azmat Ali Khan* v. *Mussamat Lalli Begum* (4)].

The Respondent did not appear.

The judgment of their Lordships was delivered by

LORD FITZGERALD:—

In this case some questions of importance have been raised, and their Lordships regret that they have not had the assistance of counsel appearing for the Respondent. Their Lordships are therefore impressed with the propriety of not going beyond questions which are absolutely necessary for the purpose of their decision.

(1) 3 Moore's Ind. Ap. Ca 295, 316.
(2) 3 Sel. Rep. 152.
(3) 11 Moore's Ind. Ap. Ca. 94.
(4) Law Rep. 9 Ind Ap 8.

The real issue in this case, and the only issue upon which their Lordships feel it is necessary to decide, is whether *Selim*,—who was beyond question the actual son of *Amir Hossein* by a woman known as *Domni*,—had been so recognised by *Amir Hossein* as to give him the *status* of a son capable of inheriting. The suit relates to the property of *Amir Hossein*. He died in the year 1866: and if *Selim* is in the position of having the rights of a son in reference to heirship, the Plaintiff in the case, who claim as the assignee of his interest, is entitled to succeed. A question of importance was raised by the counsel for the Appellant. He contended that *Selim* could not be treated as having acquired the *status* of a son capable of inheriting, because he alleged that the intercourse between *Amir Hossein* and *Domni* was an adulterous intercourse, as she had been previously married to a person then and still living, and that consequently, whether her connection with *Amir Hossein* was preceded by a marriage ceremony with him or not, yet still the intercourse was adulterous, and that according to Mahomedan law, the issue of that adulterous intercourse could not inherit as heir or acquire the *status* of a son by recognition. It, therefore, becomes necessary to consider in the first instance whether the alleged marriage of *Domni* to a man named *Jummun* has been established by satisfactory proof. *Jummun* appears to have been a person of somewhat the same degree in life as *Domni*, whose father's name was also *Jummun*. This marriage, if it took place at all, would have occurred shortly before or somewhere about the same period as the alleged marriage between *Amir Hossein* and *Domni*. The alleged marriage of *Jummun* with *Domni* is said to have been somewhere about 1852 or 1853, and the alleged marriage of *Domni* with *Amir Hossein* must have taken place about the same period. *Amir Hossein* died in 1866, leaving *Selim* his son then about eight or nine years of age, which would have made him born in 1857 or 1858. Another child had been born of the intercourse between *Amir Hossein* and *Domni* about four years before; so that the marriage between *Amir Hossein* and *Domni*, if it ever took place, is referred to about the same period as the alleged marriage between *Jummun* and *Domni*.

Now the account given by *Jummun* is certainly one of an

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incredible character. The statement is that he became acquainted with *Domni* when he went to live in this particular village. He gives a description of her. He says that he had illicit intercourse with her; that he kept that illicit intercourse on for about a month. Then he says, "I heard that before I had intimacy with *Domni* three children had been born of her." That is his first statement. *Domni* was then a girl represented on the one side to have been twelve, thirteen, or fourteen years of age, and on the other side to have been fifteen or sixteen or possibly beyond that; but let us take a mean between them, and say that she was then fifteen years of age. He says that before he became acquainted with her she had three children by others. That is his first statement. Then, after stating his intimacy with her, he says she came to him,—she who had in this village or elsewhere three children,—and said to him, "The Meahs will reprimand us; let us run away to *Bandah*." Something of the kind might have occurred with a young girl; but with a shameless prostitute, such as *Domni* is represented to be, it is very incredible that such a thing would take place. He then describes the flight; getting to a considerable distance, when they are overtaken and brought back by a servant coming from the house of *Wahid Ali Khan*, who said, "Come back, and I will get you two married." He then says that he went back; and he describes the alleged marriage with minute particularity. He then states these circumstances: that soon after the marriage he found that she had entered upon a course of the most disgraceful prostitution. His story does not bear repetition. He describes her on the bed with four or five men. It is evident from this statement that he intended to lead to the inference that all those persons were having connection with his wife. He then says he is threatened by one of them, who says, "You have no claim over *Domni*." He then applied to *Wahid Ali Khan* for aid and protection, who refused to assist him, and in consequence he left. For twenty-five years afterwards he never revisited the village, and does not appear to have been heard of or seen by anyone there. That statement appears on the very face of it to be exceedingly improbable. There are other circumstances connected with it which lead further to the belief in its improbability. He himself

appears to be a person of not very moral character; for he says, "I kept several women without nika." But he says, notwithstanding all this, "I have never been divorced, and I still consider her as my married wife." The circumstances that he is detailing, if true, must have been notorious in this village: the marriage with *Jummun*; her profligacy, her wandering about the village, and being what may be called the commonest of common prostitutes. Those are things that must have been perfectly public; and yet the case is that, with that publicity, *Amir Hossein*, a person of superior degree, knowing, as he must have known as an inhabitant of the village, of the profligate course of this woman, took her to live in his house as if she was his wife. Undoubtedly he did take her to his house, and cohabited with her as his wife, and she became the mother of his children; but it is exceedingly improbable that he would have done that if there had been this previous marriage and this course of open profligacy on the part of this young woman.

Several witnesses are called to prove the marriage; and their evidence is examined with critical accuracy by the Judge of the Court below. It is necessary for their Lordships now to come to a determination upon it; and their Lordships are of opinion that in dealing with that evidence the criticisms pronounced by the learned Judge of the Court below who tried the case, and who saw the witnesses, are well founded, and that there is no reliable evidence, in confirmation of that extraordinary story which *Jummun* tells, upon which their Lordships can now say that this marriage with *Jummun* ever took place; and on the contrary, they have come to the conclusion that it did not take place.

Domni has been examined; she had been called as a witness for the Appellant. The first question of importance put with a view to establish her marriage with *Jummun* was: "Do you know a person of the name of *Jummun?*"—that happens to be her father's name; and she at once affirms, "I never knew anyone of the name of *Jummun* but my father." The examination is immediately dropped. There is no attempt to confront her with *Jummun*, or to ask her this question, "Do you see that man there? He is the *Jummun* alluded to. Were you married to him, or is he your husband?" She contradicts the statement

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brought forward to establish this marriage by deposing that she never knew a person of the name of *Jummun* save her father; and upon her subsequent examination she says, "I was married once, and once only, and that marriage was to *Amir Hossein*."

Their Lordships have then come to the conclusion that the parties fail to establish this marriage between *Jummun* and *Domni*. That relieves them from offering any opinion upon the very important question of law which was raised by the counsel for Appellant; namely, whether, if there had been this marriage, the offspring of an adulterous intercourse could be legitimated by any acknowledgment. The absence of reliable proof, such as their Lordships could act upon, of the marriage of *Domni* and *Jummun*, appears to their Lordships to relieve the case from further difficulty. They do not intend in the least to depart from the statement of the law upon an appeal to the Privy Council in the case of *Nawab Muhammad Azmat Ali Khan* v. *Mussumat Lalli Begum* (1), which is as follows:—"Their Lordships are relieved from a discussion of those authorities, inasmuch as the rule of Mahommedan law has not been disputed at the bar; viz., that the acknowledgment and recognition of children by a Mahommedan as his sons gives them the *status* of sons capable of inheriting as legitimate sons, unless certain conditions exist, which do not occur in this case." Their Lordships do not intend at all to depart from that rule, or to throw any doubt upon it. The Judge of the primary Court who saw and who heard the witnesses, and the Judges of the Supreme Court who examined into the evidence, afterwards concur in opinion that there was sufficient evidence of the acknowledgment by *Amir Hossein* of *Selim* as his son, from which an inference is fairly to be deduced that the father intended to recognise him and give him the *status* of a son capable of inheriting. Upon that point both the Courts come to one conclusion; and that conclusion their Lordships adopt. They think that the *status* of *Selim* as son has been sufficiently established by recognition so as to enable him to claim as heir. Other questions have been raised in the case; but in accordance with what has been stated as their Lordships' view, they think

(1) Law Rep. 9 Ind. Ap. 8, 18.

they ought not in a case of this kind to go beyond what is necessary for the decision.

Their Lordships will, therefore, humbly advise her Majesty to dismiss the appeal, and to affirm the decision of the Court below. There will, of course, be no costs in this case.

Solicitors for Appellant: *Watkins & Lattey.*

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RAM KIRPAL SHUKUL . . . . . DECREE HOLDER;

AND

MUSSUMAT RUP KUARI . . . . RESPONDENT.

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Nov 8; Dec. 1.

ON APPEAL FROM THE HIGH COURT FOR THE NORTH-WEST PROVINCES.

Res judicata—Effect of Order in Execution Proceedings.

A Judge having decided in the course of execution proceedings that the decree according to its true construction awarded future mesne profits, *held* that such decision having been or become final was binding between the parties, and could not in a later stage of the execution proceedings be set aside and future mesne profits be disallowed.

The binding force of such a decision depends upon general principles of law and not upon sect. 13, Act X. of 1877.

APPEAL from a decision of the High Court (Aug. 10, 1880), which reversed, after a reference to a Full Bench, the decision of the Judge of *Gorukhpur* (July 26, 1879), confirming the decision of the Subordinate Judge of the same place (May 10, 1879).

The proceedings are sufficiently set out in the judgment of their Lordships.

The Subordinate Judge held the decree holder to be entitled to future mesne profits, on the proper construction of his decree, dated June 12, 1862, and because the Judge on Dec. 20, 1867, had so held.

The High Court when the case came before them by an order

* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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of reference, dated 21st July, 1880, referred to a Full Bench the question whether the law of *res judicata* applies to proceedings in execution of decree. The Full Bench were unanimously of opinion that the law of *res judicata* did not apply to such proceedings.

Their judgment, delivered by Mr. Justice *Pearson*, was as follows:—

"Sect. 13, Act X. of 1877, embodies the law of *res judicata* and declares that 'no Court shall try any suit or issue in which the matter directly and substantially in issue, having been directly and substantially in issue in a former suit, in a Court of competent jurisdiction between the same parties, or between parties under whom they or any of them claim litigating under the same title, has been heard and finally decided by such Court.

"*Primâ facie* the law above quoted refers only to matters decided in suits. It was suggested that the word 'suit' might include all the proceedings in execution of the decree passed in the suit. But, even on such a construction, it could not be held that a matter decided in former execution proceedings had been decided in a former suit, unless each application for execution of decree were regarded as a separate suit. That an application is a distinct thing from a suit, in the language of Indian legislation, is, however, conclusively proved by the provisions of the Law of Limitation. Proceedings in execution of decrees are included in the category of miscellaneous proceedings, which are expressly distinguished from suits and appeals in sect. 647 of the *Procedure Code*. That section enacts that the procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals. It was suggested that under the provisions of that section the law of *res judicata*, contained in sect. 13, would apply to proceedings in execution of decrees, but I cannot hold the law of *res judicata* to be procedure.

"I would therefore reply in the negative to the question on which our opinion has been asked."

Thereupon the Divisional Bench of the High Court on August 10th, 1880, passed the order which is set out in their Lordships' judgment.

Davey, Q.C., and *W. A. Raikes*, for the Appellant, contended that this decision was wrong. The section of the Procedure Code applies to proceedings in another suit. The High Court have misapprehended the question before them. If right in principle, they are wrong in its application: see sects. 13 and 244 of Act X. of 1877. Suppose it had been found necessary to bring a fresh suit, Mr. *Probyn's* order would then have constituted *res judicata*, but because it is in the same action they hold it to be of no importance. That order was final, for no appeal had been brought against it, perhaps could not have been brought. Reference was made to *Manjunath Badrabhat* v. *Venkatesh Govind Shanbhog* (1); *Mungal Pershad Dichit* v. *Grija Kant Lahiri Chowdhry* (2); *Dheeraj Mahtab Chand* v. *Bulram Singh* (3). The "cause of action" in sect. 2, Act VIII. of 1859, is to be liberally construed: *Soorjomonee Dayee* v. *Suddanund Mohapatter* (4).

Cowie, Q.C., and *C. W. Arathoon*, for the Respondent, contended that the question was whether the order of Mr. *Probyn* in 1867 was a regular proceeding and made with jurisdiction; in other words, whether it can now be objected to. If the decree in execution did not on its true legal construction direct future mesne profits, it was not within the province of Mr. *Probyn* practically to add a direction to that effect under colour of construing the decree. Reference was made to sect. 11 of Act XXIII. of 1861, and to sect. 41 of Act X. of 1877. Where the right to mesne profits at all is undetermined by the decree an application for them in execution cannot be entertained; it must be heard as a suit. If the decree was silent on the subject, a decision in execution cannot place the parties in the same position as if it had directed them. The original decree on its true construction did not direct them, and there is nothing from which it could be inferred that its intention was to give them.

Counsel for the Appellant were not called on to reply.

(1) Ind. L. R. 6 Bomb. 54.
(2) Law Rep. 8 Ind. Ap. 123.
(3) 13 Moore's Ind Ap. Ca. 179.
(4) Law Rep. Ind. Ap. Sup. Vol. 212; 12 Beng. L. R. 304.

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RAM KIRPAL SHUKUL

MUSSI MAT RUP KUARI.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from an order of a Divisional Bench of the High Court of Judicature for the North-Western Provinces of *Bengal*, dated the 10th of August, 1880, by which an order of the Subordinate Judge of *Gorukhpur* and an order of the Judge of the same district were reversed. The order of the Subordinate Judge was dated the 10th of May, 1879, and was made upon a claim by *Ram Kirpal Shukul*, the present Appellant, for mesne profits in execution of a decree of the late Sudder Court, by which a decree of the Principal Sudder Ameen of the district of *Gorukhpur*, dated the 12th of June, 1862, in a suit in which *Shumbhu Pershad Shukul*, under whom the Appellant claims, was the Plaintiff and the present Respondent was the Defendant, was upheld upon appeal. Upon the claim for execution being made, a question arose whether or not the decree in execution awarded future mesne profits. That question had been determined in the affirmative on the 20th of December, 1867, by Mr. *Probyn*, the Judge of *Gorukhpur*, in a previous stage of the proceedings for execution of the same decree by the widow of the said *Shumbhu Pershad Shukul*, who in consequence of his death was the holder of the decree, and had been declared entitled against the present Respondent to proceed with the execution. The Subordinate Judge considered himself bound by the decision of Mr. *Probyn*, and he held that the debtor's objection in respect of mesne profits and his prayer for the exclusion thereof should be disallowed, and that the officer should prepare a correct account of the mesne profits. He accordingly made the order of the 10th of May, 1879, to that effect.

The order of the Subordinate Judge was affirmed on appeal by order of the Judge, dated the 26th of July, 1879. The order of the Subordinate Judge, and that of the Judge affirming the same, were appealed to the High Court, and came on to be heard before a Divisional Bench, who referred to a Full Bench the question whether the law of *res judicata* applies in proceedings in execution of a decree. The Full Bench, after referring to sect. 13, Act X. of 1877, answered the question in the negative, where-

upon the Divisional Bench, on the 10th of August, ordered that the appeal be decreed, and that the orders of the Judge and the Subordinate Judge be reversed, and that the execution of the decree for mesne profits be disallowed.

The judgment of the Divisional Bench upon which the order was drawn up was in the following terms:—

"The Full Bench has expressed an unanimous opinion that the law of *res judicata* does not apply in proceedings in execution of decree.

"The question which the Lower Court held to be finally determined by Mr. *Probyn's* decision, dated the 20th of December, 1867, is therefore open to re-adjudication by us; and, on examining the terms of the late Sudder Court's decree, we are constrained to declare that mesne profits are not awarded by it.

"The execution of the decree for mesne profits must therefore be disallowed, and we need not consider any other matters.

"The appeal is decreed by reversal of the orders of the Lower Courts; but, under the circumstances, we direct that the parties bear their own costs in all the Courts."

It is unnecessary for their Lordships to express any opinion as to the answer of the High Court to the question propounded by the Divisional Bench, though they must not be understood as concurring in it (1). The question, if the term "*res judicata*" was intended, as it doubtless was, and was understood by the Full Bench, to refer to a matter decided by a Court of competent jurisdiction in a former suit, was irrelevant and inapplicable to the case. The matter decided by Mr. *Probyn* was not decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation. It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon sect. 13, Act X. of 1877, but upon general principles of law. If it were not binding there

(1) Law Rep. 8 Ind. Ap. 133.

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would be no end to litigation. The judgment or order of Mr. *Probyn* was an interlocutory judgment, he merely held that according to the proper construction of the decree of the Sudder Court mesne profits were awarded by it. He did not assess the amount. That had to be done in a subsequent stage of the proceedings in execution. The report of the Mohurrir of the 11th of March, 1879, gives a detail of the proceedings by which the Plaintiff in the suit, in which the Sudder Court gave judgment, and those claiming under him had been striving without success to obtain execution of the decrees of the Sudder Court from the time of Mr. *Probyn's* judgment of the 20th of December, 1867, to the 11th of September, 1878, when the application for execution upon which the orders under consideration were made was presented. In the course of those proceedings the case was, for various reasons, several times "struck off," that is to say, struck off the file of the business pending in the Court of the Subordinate Judge; but the application for execution, upon which Mr. *Probyn's* judgment was pronounced, was not dismissed, or finally disposed of. Mr. *Probyn's* judgment and the order passed thereon was never reversed or set aside. It was said that a special appeal from that judgment did not lie to the High Court. If so, the judgment was final; if an appeal did lie and none was preferred the judgment was equally final and binding upon the parties and those claiming under them. It would be a reproach upon the administration of justice if, after endeavouring for eleven years to obtain execution for mesne profits in accordance with a judgment of a Court of competent jurisdiction against which no appeal was preferred, the parties could now be told that that judgment was erroneous, and that they were not entitled to mesne profits. It was contended at the bar, on behalf of the Respondent, that if the decree of the Sudder Court did not award mesne profits, Mr. *Probyn* had no jurisdiction to hold that it did, and consequently that in that case the subsequent orders, which were based upon Mr. *Probyn's* judgment, were properly reversed by the High Court, who were correct in putting their own construction upon the decree of the Sudder Court. Their Lordships cannot concur in that view. The decree of the Sudder Court was a written document. Mr. *Probyn* had jurisdiction to execute that

decree, and it was consequently within his jurisdiction, and it was his duty to put a construction upon it. He had as much jurisdiction, upon examining the terms of the decree, to decide that it did award mesne profits as he would have had to decide that it did not. The High Court assumed jurisdiction to decide that the decree did not award mesne profits, but, whether their construction was right or wrong, they erred in deciding that it did not, because the parties were bound by the decision of Mr. *Probyn*, who, whether right or wrong, had decided that it did; a decision which, not having been appealed, was final and binding upon the parties and those claiming under them (1). It is not necessary, nor would it be correct, for their Lordships to put their construction upon the decree of the Sudder Court. If the Subordinate Judge and the Judge were bound by the order of Mr. *Probyn* in proceedings between the same parties on the same judgment, the High Court were bound by it, and so also are their Lordships in adjudicating between the same parties.

For the above reasons their Lordships are of opinion that the High Court was in error in putting a construction upon the decree at variance with that of Mr. *Probyn*, and reversing the orders of the Judge and Subordinate Judge. The High Court acted as if they had been sitting upon an appeal against the order of Mr. *Probyn*, but they were not so sitting.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the order of the High Court, and to order that the orders of the Judge and Subordinate Judge be affirmed, and that the Respondent do pay the costs incurred in the High Court by the present Appellant. The Respondent must also pay the costs of this appeal.

Solicitors for Appellant: *Oehme & Summerhays.*
Solicitor for Respondent: *T. L. Wilson.*

(1) Law Rep. 8 Ind. Ap. 123.

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Nov. 13, 14.

RAM SARUP . . . . . PLAINTIFF;

AND

MUSSUMAT BELA AND OTHERS . . . . DEFENDANTS.

[TWO CONSOLIDATED APPEALS.]

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Gift—Conditions subsequent.

Case in which it was *held* that *H.* having by a valid verbal gift (followed by delivery of possession) divested himself of all his interest in certain property in favour of his wife and her children, could not afterwards annex a condition thereto, and even if he could the condition, if immoral, would be void, and could not invalidate the gift.

APPEALS from an order of the High Court (Aug. 27, 1879) confirming an order of the Subordinate Judge of zillah *Bareilly* (Sept. 13, 1878).

The object of the Plaintiff in both suits was to obtain satisfaction of certain decrees which he had obtained, in December, 1877, against the Respondent, Captain *Hearsey*, by sale of Captain *Hearsey's* alleged interest in five villages, including certain bungalows and lands occupied therewith.

The other Respondents contended, and the Courts below concurred in holding, that Captain *Hearsey*, in the year 1870, made a gift absolutely of his whole interest in the properties in suit to them.

The facts appear in the judgment of their Lordships.

Leith, Q.C., and *C. W. Arathoon*, for the Appellants, contended that the transfer with the conditions annexed was to provide for and secure cohabitation, and therefore it was void. The gift to the alleged wife and children was inseparable, and the immorality of the condition rendered it void altogether. The gift moreover was

* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

for life only; there were no words of inheritance. [SIR ARTHUR HOBHOUSE:—By what personal law is an East Indian like Captain *Hearsey* governed?] By the law of *England*, under the rule of justice, equity, and good conscience. [SIR ARTHUR HOBHOUSE:—What law is applicable as to the mode of transfer?] No one has any special personal law except the Hindu and Mahomedan, and this man is neither. The consideration here was immoral according to English or Christian views and therefore the gift was void. Personal law governs the mode of transfer, and here it is English law whereby nothing passed. [SIR RICHARD COUCH referred to *Watkins* v. *Williams* (1).] Reference was made to *Ayerst* v. *Jenkins* (2); *Coulson* v. *Allison* (3): *Abraham* v. *Abraham* (4); *Bengal Civil Courts Act* (VI. of 1871), s. 24; *Gardiner* v. *Fell* (5); *Spirett* v. *Willows* (6).

Doyne, for the Respondents other than Captain *Hearsey*, contended that the concurrent judgments of the Courts below had conclusively established that Captain *Hearsey* made an absolute and *bonâ fide* gift of all the properties in suit to these Respondents, and the gift was followed by actual transfer of possession. As regards the mode of transfer in *Bareilly*, the transfer of liability to pay Government revenue, that is effected by mutation of names in the Collector's books. See Regulation XLVIII. of 1793, XIX. of 1795, and Act XIX. of 1873. The question whether English law governed the mode of transfer was not raised in the Courts below or in the printed case of the Appellant. Reference was made to *Freeman* v. *Fairlie* (7). Even if Engish law applied it would not have the effect of invalidating the gift to either mother or children. If the subsequent condition as to the mother was immoral, it was a void condition; the consideration was not immoral nor was the gift void. Reference was made to *Indian Contract Act* of 1872, s. 24.

Leith, Q.C., replied.

(1) 3 Mac. & G. 622.
(2) Law Rep. 16 Eq. 275, 280.
(3) 2 De G. F. & J. 521.
(4) 9 Moore's Ind. Ap. Ca. 195.
(5) 1 Jac. & W. 22.
(6) 3 De G. J. & S. 293.
(7) 1 Moore's Ind. Ap. Ca. 305.

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The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE:—

These appeals are presented by the heirs of *Luchmi Narain* in two suits instituted by him for the purpose of enforcing certain judgments obtained by him against the Defendant *Hearsey*, and making them available against property, partly in *Bareilly* and partly in *Badaun*, which formerly belonged to *Hearsey*.

In the first suit the plaint states that *Hearsey* was the owner of the property in question at the time when he gave a bond to *Luchmi Narain* dated the 3rd of February, 1873. It then states that *Hearsey*, in 1870, filed a petition in the Settlement Department alleging that the Defendant, who is generally called *Vilayati Begum*, his second wife, and her three children had been put in possession in equal shares, on condition of the wife obeying her husband and the children remaining faithful to their religion, and that a mutation of names might take place. Then it prays relief against all the Defendants; it seeks to have the property sold to the entire displacement of the Begum, and to the displacement of the children excepting as regards their interest for life.

The real questions in the case are resolved into two, the first being whether *Hearsey* had, at any time prior to the acquisition by the Plaintiff of the interest on which he now sues, intended to divest himself of all interest in this property in favour of the Defendants, and had done acts sufficient to carry his intention into effect; and, secondly, whether that transaction was invalidated by the immorality of the consideration or motive for it?

On the first question, as to the transfer, several witnesses have been examined, and they all tell substantially the same story. The story is this: That early in 1870 *Hearsey* convened a large meeting of his neighbours and acquaintances (forty or fifty are said to have been present), that at that meeting he stated that he had been very ill, that he felt the precariousness of life, that he desired to avoid disputes among the branches of his family (for besides the Begum he had other wives so called, and other children), and that on that account he intended to give, and did thereby give to the Begum and her children, who were very young at that time, his property in the zillahs of *Bareilly* and

Badaun. He said that the servants were to consider themselves not his servants but hers, and that he was to be no longer the owner of the property. And a formal ceremony took place, consisting of a gift of some rupees to the Begum by the mokuddams of the villages in question, no doubt symbolical of her assuming the ownership of the villages.

It is true that the witnesses, according to the translations that we have before us, differ in the expressions used as to the gifts to the children. They talk of a gift to the Begum and her sons,—a gift to her and her descendants,—to her and her issue, and so forth. How far those different expressions may be due to different translations of the same word, and how far they may represent different words, is not told us; but their Lordships do not doubt that the substantial meaning of the witnesses was that the gift was intended by *Hearsey* for the Begum, whom he calls his second wife, who was acting as a wife to him, and those children whom she had borne to him, and whose interest he intended to protect against disputes.

From that day to this the possession has been enjoyed by the Begum, and there is evidence of many acts of ownership which she has exercised over the property. On that evidence both the Courts below have found that the whole of *Hearsey's* interest was divested from him and vested in the other Defendants. It is not necessary to refer to the passages in which their opinions are embodied, but the ultimate result may be stated in the finding on the 4th issue by the Subordinate Court:—"That Defendant No. 5"—that is, *Hearsey*—"had no transferable right in the disputed property at the time the Plaintiff lent money to him." That finding is sustained by the High Court.

This case is one to which the general rule of this Board to the effect that they will not disturb concurrent findings of the Courts below on questions of fact is eminently applicable. The evidence is oral. It is given in a language which we have not before us, and which we should not understand if we had it. The Judge of the Subordinate Court had the witnesses before him, and the High Court, which consisted of civilian Judges, must have understood the language in which the witnesses spoke. If, therefore, there was any argument to be founded upon little discrepancies

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in the story told by the witnesses, those Courts were thoroughly competent to deal with such a question; and their Lordships would be exceedingly reluctant, even if they thought that there was any doubt about the propriety of their judgment, to disturb it. In fact Mr. *Leith* in his opening said that having regard to the evidence given in the suit he could not dispute but that there was an actual transfer of property at the time in question, that the transfer was perfectly *bonâ fide*, and that *Hearsey* was a solvent man at that time, so that no fraud upon creditors could be alleged.

The question argued upon that transaction, independently of the immorality of it, was whether or no the absolute interest passed from *Hearsey* to the Begum and her children, or whether they were entitled for life. The same reason which excludes contention as to the actual transfer taking place appears to exclude contention also as to the amount of interest passed. The question of intention depends upon the oral evidence. The overt acts are the same whether a life interest was to pass, or whether an absolute interest was to pass, and we must look to what the witnesses tell us as to the intention expressed at the time. Both Courts agree that the whole interest passed, and that expressions were used by *Hearsey* which are inconsistent with the notion that he did not intend to pass the entire ownership to the Begum and to her children.

The evidence relied upon by the Appellant is contained in the petition for mutation of names that is mentioned in the plaint. It is true that that petition and the subsequent mutation of names are of no great value for the Defendants' purpose, because the Collector had only jurisdiction with respect to the possession or that evidence of possession which the register affords, and that is the only matter which is dealt with on the mutation of names. The Defendants would be equally entitled to possession whether they were owners of the life interest or owners of the absolute interest. Therefore the petition and the mutation of names only forward the case of the Defendants to the extent of proving a real *bonâ fide* transfer of some kind at the time, but they afford no evidence as to the extent of interest conferred by the transfer. So we must see what the witnesses say upon that subject; and

they are all in accord that expressions were used which are inconsistent with the notion that any less interest than the absolute ownership was transferred. What the exact nature of the interests of the Defendants *inter se* may be is a question with which the Plaintiff has no concern. If it be the case that for some interest or other the whole ownership passed away from *Hearsey* at this time and passed into the Defendants, that is sufficient to exclude the Plaintiff from relief.

Now their Lordships pass to the next question that was raised, which depends on the immorality of the transaction. To impeach it on that ground the Appellant's counsel argue as follows: that by reason of *Hearsey's* descent and religion the case is to be governed by rules of English law; that the Begum could not be his lawful wife; that the stipulation as to her continuing to act as his wife is immoral, though she is under the Mahomedan law, which allows sexual relations forbidden to Christians; and that the gift is so thoroughly vitiated as to leave *Hearsey*, the grantor, still the owner of the property in such a sense that the Plaintiff could treat it as his right title and interest liable to be sold under an attachment.

On those questions their Lordships desire to pronounce no opinion; and for this reason: They think there is no evidence that there was an immoral consideration to vitiate the transaction. In that they concur with the two Courts below. This gift was one entire transaction; there was a single gift to the wife and the children, and a single consideration for that gift. How does the case stand with regard to the children? So far as the oral evidence goes, it is clear that no condition was imposed at the time of the verbal transfer. The only evidence of immorality is contained in the application for the mutation of names. That application states that the gift was made to the children on condition of their adhering to their religion. It is impossible to suppose that there was a consideration given by the children or any contract entered into with them at that time. They were very young infants. They could not agree to remain Christians; and although on making a gift to them, the donor might attach or purport to attach such a condition, it would be a condition only and subject to the law of conditions. The transaction being

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an entire one, it is very difficult to treat the gift to the wife differently from the gift to the children. Their Lordships think that the Courts below were right in treating the gift to her as resting on the valid and moral considerations on which it was stated to rest at the time when it took place.

Their Lordships are of opinion that the gift is in fact unconditional, because, as it was complete at the time when the actual transfer took place, the parties could not afterwards import a condition; and the petition must be treated as inefficacious for that purpose. But even if it were otherwise,—assuming a condition, and an immoral condition,—it would be the condition that is immoral and not the consideration; and then the case would fall under the general rule of law that a gift to which an immoral condition is attached remains a good gift, while the condition is void.

On these grounds their Lordships think that the appeal fails. As regards the second suit, the particulars of it have not been stated to their Lordships, but they understand from the Counsel that the issues are exactly the same as in the first suit. Their Lordships think that the decrees of the High Court of *Allahabad* should be affirmed, and these appeals dismissed with costs.

Their Lordships will humbly advise Her Majesty to this effect.

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for Respondents, except Captain *Hearsey*: *Barrow & Rogers.*

ACHAL RAM . . . . . DEFENDANT;

AND

UDAI PARTAB ADDIYA DAT SINGH . . PLAINTIFF.

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Nov. 29, 30.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Oudh Estates Act (I. of 1869)—Talukdar in List No. 2—Estates descending to a single Heir.

Held, that where a talukdar's name is entered in the second list prepared under Act I. of 1869 and not in the third, the estate, although it is to descend to a single heir, is not to be considered as an estate passing according to the rules of lineal primogeniture.

APPEAL from a judgment of the Judicial Commissioner of *Oudh* (Feb. 25, 1881), reversing a judgment of the Officiating District Judge of *Fyzabad* (June 21, 1880), and decreeing the suit of the Respondent.

The property in dispute was the *Birwa* taluk, which was recognised by the *Oudh Talukdar's Act* (I. of 1869) as having been the property of *Pirthi Pal Singh*, who was accordingly placed in the first and second lists prepared under the Act. *Pirthi Pal* died leaving a widow and a daughter, who successively held the taluk. On the death of the daughter the taluk was claimed by her husband, the Appellant, as her heir, and by the Respondent, a distant collateral relation of *Pirthi Pal Singh*, as the nearest male heir of her father. The husband relied on a will of *Pirthi Pal Singh*, which he asserted conferred the estate absolutely upon his daughter. The Respondent denied the genuineness and the effect of the supposed will. The Government recognised the husband as talukdar, and his title was supported by the District Judge. The Judicial Commissioner held that the will was not proved, but that even if genuine, it did not confer upon the daughter any estate larger than the ordinary estate of a daughter, and that

* *Present:*—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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upon her death without issue the Respondent, as nearest male collateral heir of *Pirthi Pal Singh*, was entitled to succeed.

The District Judge found *Pirthi Pal's* will to be genuine, and that it, coupled with Act I. of 1869, made the estate in suit the separate property of *Brij Raj Kunwar*, and, in consequence, her husband her legal heir: *Brij Indar Bahadur* v. *Janki Kunwar* (1). He also decided that the Plaintiff was a member of the family of *Pirthi Pal*, and that, as head representative of his line, he was the lawful heir by primogeniture to *Pirthi Pal*.

The Judicial Commissioner, on the contrary, as regards the interest which *Brij Raj Kunwar* took in the taluk, held that the case was not governed by the Privy Council decision in *Brij Indar* v. *Janki Kunwar*, since in that case the first talukdar under Act I. of 1869 was the widow, her mother, whereas in the present case the first talukdar was *Pirthi Pal Singh*. Therefore, in the absence of any conflicting circumstances, the daughter would take a mere woman's estate as heir to her father.

And, as regards the effect of *Pirthi Pal Singh's* will, assuming it to be genuine, and as to the remaining questions in the appeal, his judgment proceeded as follows:—

"And I further find that by Hindu law, if a father give to an heir that which the heir would take independently of the gift, the gift does not alter the nature of the estate inherited. So that if on the above-mentioned assumption *Bhaiya Pirthi Pal Singh* did leave a will, that will would not alter the nature of the estate taken under it by his daughter, unless by the special provisions of Act I. of 1869.

"But if the will came to be interpreted there would be no absolute property in excess of the estate naturally devolving, unless the same was gifted in express terms. And there were no such express terms. On the contrary, it is stated that after *Sarfraz Kunwar*, 'my daughter, *Brij Raj Kunwar*, is the heiress of myself and the said thakurain, and will receive the entire estate, &c., in the room of the aforesaid thakurain,' which conveys precisely the restricted interest which is shewn above to devolve on women in *Oudh*, and would cause the estate at her death

(1) Law Rep. 5 Ind. Ap. 1.

without issue to pass to her father's heirs. And if it be contended that under the special provisions of Act I. of 1869 she did, as legatee of her father, acquire a power of alienation which she would not otherwise have possessed, the answer is that if she had the power she never exercised it in favour of *Achal Ram* or any one else, and so for all practical purposes the power was as if it had not existed.

"From this point of view I find that the alleged will of *Bhaiya Pirthi Pal Singh* would, if genuine, have no effect on the claim to the taluka, and that if both wills set up be genuine, the heirs to *Brij Raj Kunwar's* landed estate by Hindu law and Act I. of 1869, must be sought among the male reversionary heirs of the first talukdar *Bhaiya Pirthi Pal Singh*, and that in no case would the Defendant *Achal Ram* succeed as heir to his deceased wife's taluka. There remains the question as to whether the Plaintiff-Appellant *Bhaiya Udai Partab Singh* is such male reversionary heir, considering that, as stated in an early part of this judgment, according to ordinary Hindu law, *Harbhagat Singh* was the nearest collateral heir male to *Bhaiya Pirthi Pal Singh* at his death, and failing him *Iabraj Singh*, *Arjan Singh*, and the sons of *Harbhagat Singh*, would have precedence as collateral male heirs.

"Those named above are not parties to this litigation, and no right that they might have as against *Udai Partab Singh* would be prejudiced by a decree in his favour against *Achal Ram*, who is found to have no right or title at all in the taluka, and in one sense there is a community of interest in all the males of the *Bhinga* branch, that the *Birwa Mahnoun* estate should not pass to a stranger to the prejudice of their reversionary rights to succeed the last male proprietor. In both these estates the succession is to be regulated by the rule of primogeniture, and Plaintiff, as senior heir male of the *Bhinga Bisein* family has succeeded to and is in full proprietary possession of that taluka. He may therefore well be held to be representative of the reversioners in his branch, and anyhow it does not lie in the mouth of Defendant, who is found to have no legal warrant for his possession of the *Birwa* estate, to deny that the Plaintiff has a *locus standi*, on the ground that it may be that he may not afterwards be

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found to be the man among the reversioners whom he represents who should succeed. For the purposes of this suit I therefore further find that *Bhaiya Udai Partab Addiya Dat Singh* is the male reversionary heir of *Bhaiya Pirthi Pal Singh*, after the death of Thakurain *Brij Raj Kunwar*."

Cowie, Q.C., and *Woodroffe* (*J. E. Howard* with them), for the Appellant, contended that the evidence showed that there were members of the family who stood nearer in degree to *Pirthi Pal Singh* than the Respondent, and that thus the Respondent had not made out his title, assuming the intestacy of the deceased. The deceased was entered in the second list, but not in the third, and therefore the rule of lineal primogeniture did not prevail. By the rule of ordinary devolution upon a single heir contemplated by the Act, the nearer in degree will exclude the more remote. The Respondent to make out his title must rely on the rule of lineal primogeniture, which only applies to talukdars in the third list. Reference was made to *Brij Indar Koer* v. *Janki Kunwar* (1) as to the effect of the Act in creating title irrespective of previous custom. The Hindu rule as to primogeniture is distinct from the English rule. Impartibility does not destroy or affect the Hindu rule as to inheritance: *Periasami* v. *Periasami* (2); *Mayne's* Hindu Law, sects. 461, 462.

Leith, Q.C., and *Mayne*, contended that the Respondent had been rightly found to be, either by law or by waiver on the part of those with prior rights of inheritance, the person entitled as next heir to *Pirthi Pal Singh* on the death of his daughter.

Cowie, Q.C., replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This was a suit brought by *Udai Partab* against *Achal Ram*, who was the husband of *Brij Raj Kunwar*, deceased, and who obtained possession of the estate in question upon the death of his wife. The Plaintiff alleged himself to be the heir of *Pirthi*

(1) Law Rep. 5 Ind. Ap. 1. (2) Law Rep. 5 Ind. Ap. 61, 72.

Pal Singh, and in the action of ejectment it was necessary for him before he could turn out the Defendant to prove that he had a better title. He attempted in support of his title to shew that the estate was to descend according to the rules of lineal primogeniture. If that rule prevailed he appears to have been the heir of *Pirthi Pal Singh*. A question was raised in the suit whether *Pirthi Pal Singh* had made a will; but it is unnecessary to decide that question, because, whether he made a will or not, or whether his daughter, *Brij Raj Kunwar*, the wife of the Defendant, took an absolute estate or not, is immaterial, if the Plaintiff fails to prove that he has a better title than the Defendant. It is necessary, therefore, for the Plaintiff to make out that the estate descended according to the rules of lineal primogeniture as distinguished from descent to a single heir amongst several in equal degree.

The estate in question was a taluk created by the Government of *India* after the confiscation of *Oudh*. *Pirthi Pal Singh*, upon whom it was conferred, died before Act I. of 1869 was passed; but the taluk was one in respect of which the Government of *India* laid down certain rules as to the title of the talukdars whom they had created and as to the mode of succession. The preamble of Act I. of 1869, intituled the *Oudh Estates Act*, is in these words:—"Whereas after the re-occupation of *Oudh* by the British Government in the year 1858, the proprietary right in divers estates in that province was under certain conditions conferred by the British Government upon certain talukdars and others: And whereas doubts may arise as to the nature of the rights of the said talukdars and others in such estates and as to the course of succession thereto: And whereas it is expedient to prevent such doubts and to regulate such course and to provide for such other matters connected therewith as are hereinafter mentioned; it is hereby enacted as follows." Among other enactments is sect. 8, which provides that "Within six months after the passing of this Act the Chief Commissioner of *Oudh*, subject to such instructions as he may receive from the Governor General of *India* in Council, shall cause to be prepared six lists; namely, first, a list of all persons who are to be considered talukdars within the meaning of this Act." *Pirthi Pal Singh*, who had been allowed

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to contract for the revenue, and with whom a summary settlement had been made, was entered in the first of the lists as a talukdar; and he must therefore be deemed a talukdar within the meaning of the Act. He was also entered in the second of the lists, which is a list of the talukdars whose estates, according to the custom of the family on and before the 13th day of February, 1856, ordinarily devolved upon a single heir. Therefore the taluk must be considered as a taluk which ordinarily descended upon a single heir; but it omits altogether to state that that heir is to be ascertained by the rules of lineal primogeniture. The third list is "A list of the talukdars not included in the second of such lists to whom sunnuds or grants have been or may be given or made by the British Government up to the date fixed for the closing of such lists, declaring that the succession to the estates comprised in such sunnuds or grants shall thereafter be regulated by the rules of primogeniture." *Pirthi Pal Singh* was not entered in that list, and it is contended that because he was in the list of estates which ordinarily devolved upon a single heir it is to be presumed that the heir was to be ascertained according to the rules of lineal primogeniture. Their Lordships cannot concur in that contention. They are of opinion that when a talukdar's name was entered in the second list and not in the third, the estate, although it is to descend to a single heir, is not to be considered as an estate passing according to the rules of lineal primogeniture.

Now the Plaintiff having to make out his title, the District Judge in the first Court found that the estate was to descend according to the rules of primogeniture, not saying lineal primogeniture. There was no evidence to shew that the estate had descended according to the rules of lineal primogeniture, even if such evidence could have got rid of the provisions of the Act. The Judicial Commissioner also found that the estate descended according to the rules of primogeniture, and it is said that there were two concurrent findings upon a question of fact; but when their Lordships come to examine the reasons and the grounds of the decision of the Judicial Commissioner, they find that he was in error. He says that there was a sunnud granted to *Pirthi Pal Singh*, according to which the estate was to pass according to the

rules of primogeniture. He says:—In the present case the confiscation was admitted in favour of *Bhaiya Pirthi Pal Singh*, and the grant as by sunnud is to him and his heirs male according to the law of primogeniture; so that unless his daughter from some cause takes a full proprietary heritable estate, those entitled to succeed after her must be sought for amongst the heirs of *Bhaiya Pirthi Pal Singh*." Then he enters into the question whether the Plaintiff is the nearest heir according to the rules of lineal primogeniture. Both Courts appear to have failed with reference to the principle that a Plaintiff seeking to recover possession of an estate against a person who is in possession must recover upon the strength of his own title, and not upon the weakness of his adversary's title. That is a principle of law, and a very essential principle to be acted upon. The Judicial Commissioner, after deciding that the male reversionary heirs of *Pirthi Pal Singh* were to come in, says:—"There remains the question as to whether the Plaintiff-Appellant, *Bhaiya Udai Partab Singh*, is such male reversionary heir, considering that, as stated in an early part of this judgment, according to ordinary Hindu law *Harbhagat Singh* was the nearest collateral heir male to *Bhaiya Pirthi Pal Singh* at his death, and failing him *Jabraj Singh*, *Arjan Singh*, and the sons of *Harbhagat Singh* would have precedence as collateral male heirs. Those named above are not parties to this litigation, and no right that they might have as against *Udai Partab Singh* would be prejudiced by a decree in his favour against *Achal Ram*, who is found to have no right or title at all in the taluka. And in one sense there is a community of interest in all the males of the *Bhinga* branch, that the *Birwa Mahnoun* estate should not pass to a stranger, to the prejudice of their reversionary rights to succeed the last male proprietor. In both these estates the succession is to be regulated by the rule of primogeniture; and Plaintiff-Appellant, as senior heir male of the *Bhinga Bissin* family, has succeeded to and is in full proprietary possession of that taluka. He may therefore well be held to be representative of the reversioners in his branch, and anyhow it does not lie in the mouth of Defendant-Respondent, who is found to have no legal warrant for his possession of the *Birwa* estate, to deny that the Plaintiff has a *locus*

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standi, on the ground that it may be that he may not afterwards be found to be the man among the reversioners whom he represents, who should succeed." In short, the Judicial Commissioner comes to the conclusion that, inasmuch as the Defendant is shewn to have no title according to his ruling, therefore he has no right to say that the Plaintiff is not entitled to succeed. He entirely reverses the rule on which actions to recover possession are founded; namely, that he who seeks to turn another out of possession must first prove that he has a better title. His judgment is consequently erroneous, and ought to be reversed.

It has been stated that the judgment obtained by the Plaintiff has been executed, and that the Defendant has been turned out of possession. There is no evidence to that effect; but if it is the case the Defendant ought to be restored to possession, and ought not by reason of his having been turned out under an erroneous judgment, to be placed in the position of having to seek to recover possession himself and to prove his title.

Their Lordships will humbly advise Her Majesty that the decree of the Judicial Commissioner be reversed, and the decree of the officiating District Judge affirmed; that the Respondent do pay the costs in the lower appellate Court; and that, if the Appellant has been put out of possession under the decree of the lower appellate Court, he be restored to possession.

The Respondent must pay the costs of this appeal.

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for Respondent: *Young, Jackson, & Beard.*

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ACT I. OF 1869, s. 13. *Held*, that a sister's son is not a person a bequest to whom in the lifetime of a brother is excepted from the necessity of registration under sect. 13 of Act I. of 1869.

Quære, whether a person entitled to maintenance has such an interest in the deceased's estate as would except a bequest in his favour from the like necessity.

A deposit of a will under Part IX. of Act VIII. of 1871 is not a registration as required by Act I. of 1869. *Haji Abdul Razzak* v. *Munshir Amir Haidar* 121

——————, ss 19, 11. See Construction.

ACT IX. OF 1871, SCHED. II., ARTS. 48, 60, 118. See Execution.

ACT XV. OF 1877, SCHED. II., ART. 109. See Limitation.

ACT XXIV. OF 1870, s. 4, CL. 3. See Oudh Incumbered Estates Act.

ANCESTRAL IMPARTIBLE RAJ. See Hindu LAW. 1.

BUDDHIST LAW OF MARRIAGE. In a suit by a wife against her husband to recover the expenses of necessaries and living for the past five years:—

Held, that the parties being Buddhists, the case must, under the *Burmah Courts Act*, 1875, s. 4, be decided according to the Buddhist law; and that by that law the wife having maintained herself out of her separate property cannot sue for maintenance for the period during which she has done so:—

Held, also, that even if the rule of justice, equity, and good conscience applied, the Plaintiff had not established any ground for making the Defendant liable for her maintenance. *Moung Hmoon Htaw* v. *Mah Hpwah* 109

CONSTRUCTION. Case in which it was held that an instrument which had been executed by a talukdar (reserving a life interest) for the purpose of effecting after his death a transfer of property to the Respondent must, having regard to its substantial characteristics, to its answering the definition of a will contained in sect. 2 Act I. of 1869, and to its having been registered as a will, and setting aside mere technical expressions such as "tamlik," be regarded as a will and not as a transfer operating *inter vivos*.

Held, that Act I. of 1869, s. 11, which gives not only to the original talukdar, but to every heir and legatee of a talukdar, power to transfer or bequeath the estate granted to him, is not controlled in its operation by the proviso to sect. 19. That proviso, to the effect "that nothing herein contained shall affect wills made before the passing of the Act," relates to the provisions contained in sect. 19 and not to those contained in the whole of the Act, and therefore does not control sect. 11.

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Although an impartible estate will, if there is no indication to the contrary, descend according to the law of primogeniture: *held*, in this case, where the talukdari has been entered in list 2 and not in list 3, that a rule of selection and not primogeniture was the governing rule of the family. *Thakur Ishri Singh* v. *Baldeo Singh* .. 135

CUSTOM. See Hindu Law. 1; and Construction.

DEPOSIT OF WILL. See Act. I of 1869.

EXECUTION. The Plaintiffs having recovered a money decree against *M.'s* widow for the wrongful conversion of their timber by *M.*, attached in execution the property of the Defendant *M.'s* brother, and upon such attachment being disallowed sued to establish their right to execution against the attached property upon the ground that the Defendant had benefited by the timber taken by *M.* and after *M.'s* death had sold the same and appropriated the money :—

Held, that the Plaintiffs had a right to follow the proceeds of the timber, and that the Defendant having received the money and not having paid it over to *M.'s* widow, they had a right to recover the amount from him :

Held, with regard to limitation, that under Act IX. of 1871, art. 118, the Plaintiffs had a right at any time within six years from the time when the Defendant received the money, to hold him responsible to them for the amount. *Gooroo Das Pyne* v. *Ram Narain Sahoo* 59

GIFT TO GRANDCHILDREN WITH SON'S CONSENT. See Hindu Law. 2.

GIFT TO UNBORN PERSONS. See Hindu Law. 2.

1. HINDU LAW (MITAKSHARA). *Held*, on the evidence in the case, that the raj in question was an ancient raj and an ancestral estate, and that by virtue of an ancient custom in the family it was impartible.

According to the Mitakshara the estate being ancestral and the family undivided, the Plaintiff as the nearest male heir of the deceased Rajah and the surviving member of the undivided family was entitled to succeed to the raj in preference to the widow.

A female cannot inherit an impartible ancestral estate belonging to a joint Hindu family governed by the Mitakshara when there are any male members of the family who are qualified to succeed as heirs.

Maharani Hiranath Koer v. *Baboo Ram Narain Singh* (9 Beng. L. R. 274) approved.

Held, in this case, that such law was not shewn to have been modified by an ancient uniform custom in favour of the widow.

An ancestral estate even though impartible is not the separate or self-acquired estate of the single member upon whom it devolves so long as the family continues joint.

Chintamun Singh v. *Mussunnut Nowlukho Konwari* (Law Rep. 2 Ind. Ap. 263) approved. *Rajah Rup Singh* v. *Rani Baisni and the Collector of Etawah* 149

2. ——————— A deed of gift by a Hindu (Mitakshara) of his ancestral immoveable estate (the family being joint) in favour of the children of *U.* his only son, who consented thereto, was followed by mutation of names in favour of the only one of such children then born, under the guardianship of his mother. Both grandfather and grandchild died. In a suit by a judgment creditor of *U.* against the

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mother and heiress of the donee to avoid the said deed and to make the land comprised therein available to answer *U.*'s debts :—

Held, that the deed having been made on good consideration and in good faith was valid, whether or not *U.*'s creditors were unpaid :—

Held, further, that the deed, expressed to be in favour of children some of whom were unborn, was not on its true construction a gift to a class, void as to all, because inoperative as to some. If the donee's possible brothers are unable to take by virtue of the gift, the donee shall take the whole by virtue of the family arrangement, evidenced by the deed and acts done under the deed; in any event the property in suit effectually passed away from the grandfather and *U. Rai Bishen Chand* v. *Mussumat Asmaida Koer* 164

HINDU WIDOW. By Hindu law the husband's estate vests in his widow absolutely for some purposes, though in other respects for a qualified interest.

When a Hindu widow's right, title, and interest is sold in execution of a decree, the Court is at liberty to look to the judgment to ascertain what was sold thereunder.

Where it appeared from the judgment that the decree against the widow was in respect of the husband's estate, and bound the reversionary heir, *held*, that the purchaser of her right and interest in execution took the estate absolutely. *Gooroo Das Pyne* v. *Ram Narain Sahoo* 66

LIMITATION. Under *Limitation Act* XV., of 1877, sched. II., art. 109, mesne profits can only be recovered for the three years next before the filing of the plaint.

Held, that the Defendant, who had only come into possession of the estate in suit on its being released from the charge of a superintendent appointed under Act XXIV. of 1870, could not be charged with sums which might have been received by the Superintendent but for his wilful default.

There being no rule of law obliging the Court to allow interest upon mense profits, the discretion of the lower Courts in refusing interest was not interfered with. *Kishna Nand* v. *Kunwar Partab Narain Singh* 88

——— See Execution.

MESNE PROFITS. See Limitation.

MORTGAGE. The purchaser of an equity of redemption in reference to immovable property situated in the *Hyderabad* Assigned Districts, paid off the first mortgage thereon with notice of a second mortgage :—

Held, that he must be assumed, according to the rule of justice, equity, and good conscience there applicable, to have intended to keep the first mortgage alive, and that therefore he was entitled to stand in the place of the first mortgagee and to retain possession against the second mortgagee until repayment.

The doctrine laid down in *Toulmin* v. *Steere* (3 Mer. 210), that the purchaser of an equity of redemption cannot set up a mortgage which he has got in against subsequent incumbrances of which he had notice, is not to be regarded as a rule of justice, equity, and good conscience, and therefore cannot be applied to such Indian transactions as are governed by that rule. *Gokuldass Gopaldass* v. *Rambux Seochand* 126

OUDH INCUMBERED ESTATES ACT. *Held*, that a mortgage bond which contains no personal contract to pay out of the mortgagor's personal

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estate, but is a mere contract to pay out of the hypothecated taluka, which at the date of the bond was under the operation of the *Incumbered Estates Act* (XXIV. of 1870), is invalid under sect. 4, cl. 3. *Narotam Das* v. *Sheo Pargash Singh* 83

POWER OF ATTORNEY. A power of attorney gave to the holders authority "for the purposes aforesaid to sign for me and in my name and on my behalf any and every contract or agreement, acceptance, or other document," the purposes aforesaid being "from time to time to negotiate, make sale, dispose of, assign, and transfer" Government promissory notes, and "to contract for, purchase, and accept the transfer" of the same :—

Held, that upon the true construction of this power the holders were authorized to sell or purchase such notes, but not to pledge them.

Bank of Bengal v. *Macleod* (5 Moore, Ind. Ap. 1; 7 Moore, P. C. 35) distinguished. *Jonmenjoy Coondoo* v. *Watson* 94

POWER TO SELL OR PURCHASE DOES NOT INCLUDE POWER TO PLEDGE. See Power of Attorney.

PRINCIPAL AND AGENT. See Power of Attorney.

REGISTRATION. See Act I. of 1869.

SALE OF WIDOW'S ESTATE AS REPRESENTING HER HUSBAND. See Hindu Widow.

SUCCESSION IN RAJPOOTANA. Case in which it was held upon the evidence and authorities, no positive rule of law existing in *Rajpootana* on the subject, that the estate in suit, which was held in hawalah tenure, was not resumable by the patwir thakur merely because the holder died without issue and without adopting an heir. *Rao Bahadur Singh* v. *Mussamats Jawahir Kuar* 75

SUIT TO REALIZE DECREE FROM THE PROPERTY OF A STRANGER THERETO. See Execution.

[PRIVY COUNCIL.]

GOOROO DAS PYNE . . . . . DEFENDANT; J. C.*

AND 1884

RAM NARAIN SAHOO AND ANOTHER . . PLAINTIFFS. *Feb.* 20, 21.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Execution—Suit to realize Decree from the Property of a Stranger thereto—Right to follow Sale Proceeds of Plaintiff's Goods—Limitation—Act IX. of 1871, *sched. ii., arts.* 48, 60, 118.

The Plaintiffs having recovered a money decree against *M.'s* widow for the wrongful conversion of their timber by *M.*, attached in execution the property of the Defendant *M.'s* brother, and upon such attachment being disallowed sued to establish their right to execution against the attached property upon the ground that the Defendant had benefited by the timber taken by *M.* and after *M.'s* death had sold the same and appropriated the money:—

Held, that the Plaintiffs had a right to follow the proceeds of the timber, and that the Defendant having received the money and not having paid it over to *M.'s* widow, they had a right to recover the amount from him:

Held, with regard to limitation, that under Act IX. of 1871, art. 118, the Plaintiffs had a right at any time within six years from the time when the Defendant received the money, to hold him responsible to them for the amount.

APPEAL from a decree of the High Court (July 4, 1878) reversing that of the Subordinate Judge of *Midnapore* (Sept. 12, 1876).

The Respondents on the 29th of January, 1876, sued the Appellant, together with one *Moti Dasi*, the widow of his brother *Modhoosoodun Pyne*, to have satisfaction of a decree which the Respondents had obtained against *Moti Dasi* and one *Udoy Chand Pyne* by sale, in execution of that decree, of various scheduled properties standing in the name of the Appellant, who was not a party to that decree. The grounds on which the Respondents sought to make those properties responsible for that decree were, that the Appellant lived "ijmali and in joint mess" with his

* *Present*:—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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brother while alive, and had after his death sold the timbers, the conversion of which had formed the subject-matter of that suit, and appropriated the proceeds of that sale; that the Appellant therefore, though not a party to the decree, was answerable for his brother's acts; and that as the properties sought to be sold in execution were as to some the joint properties of the Appellant and his brother in his lifetime, and after his death of his widow, and as to others had been purchased with the proceeds of the sale of the timbers, the Respondents were entitled to have them sold in execution of that decree.

The first Court gave the Respondents a decree, declaring their right to sell a moiety of certain of the scheduled properties, but not of the rest.

The ground for directing that moiety so to be sold was, that in the opinion of the Subordinate Judge those properties were either ancestral or acquired after the reunion of the separated brothers, and that therefore the moiety which belonged to *Modhoosoodun Pyne* or his widow was liable to be sold in execution of the decree, which could not be executed against the moiety which belonged to the Appellant, as he was no party to that decree.

And the ground on which the Subordinate Judge exempted from sale in execution certain of the Appellant's properties was that those properties had been self-acquired by him while separated in estate from his brother, and could not therefore be made liable for the decree in question.

On appeal and cross-appeal to the High Court, the Judges of the Divisional Bench differed from the Subordinate Judge, in that they held that there was no sufficient evidence of reunion in estate so as to make the properties now in suit joint acquisitions, and that therefore neither the Appellant, who was not a party to the decree against his brother, nor his separate and self-acquired properties, could be made liable for that decree, and they consequently set aside the decree of the lower Court. But as the Judges of the High Court concurred with the lower Court that the Appellant had failed to prove that he had paid over to *Moti Dasi* the proceeds of the sale of the logs, they substituted for the decree of the lower Court a decree that the Appellant was jointly liable with *Moti Dasi* to pay the Plaintiffs Rs.22,000,

being the proceeds of the logs, and that all his properties, including those mentioned in the schedule to the plaint, as well as all *Moti Dasi's*, were liable to be sold in satisfaction of that debt.

The facts of the case are stated in the judgment of their Lordships.

Doyne, for the Appellant, contended that the judgment of the High Court was wrong. The relief decreed by it was not sought by the plaint and was inconsistent with the Plaintiffs' case. If that case had been that the sale proceeds of the timber constituted a debt due from the Appellant to *Moti Dasi*, the right course would have been to attach that debt in the hands of the Appellant under sect. 236 of Act VIII. of 1859. The prescribed procedure should be strictly followed, and this suit does not lie: *Mirza Mahomed Aga Ali Khan Bahadoor* v. *Widow of Balmakund* (1). Further the claim of the Plaintiffs, treating it as one to recover a debt from the Appellant, is barred by limitation. The money, *i.e.* the sale proceeds, were received in May, 1870. The case comes under art. 48 or art. 60 of Act IX. of 1871 sched. ii. There was either a dishonest conversion of the timber within the former article, or a receipt of money to *Moti Dasi's* use within the latter.

The Respondents did not appear.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

Their Lordships are of opinion that the judgment of the High Court ought to be affirmed.

It appears that, as far back as March, 1865, *Modhoosoodun*, who was the brother of the present Appellant, had taken some 1260 logs of timber which belonged to the Plaintiffs, and converted them to his own use. Soon after that a suit, No. 10 of 1865, was brought by the Plaintiffs against *Modhoosoodun* and another for the conversion of the timber, and a decree was obtained on

(1) Law Rep. 3 Ind. Ap. 241.

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the 30th of March, 1868, for the sum of 25,200 rupees, in favour of the Plaintiffs. That decision was appealed from to the High Court, which in January, 1869, reversed the decree. An appeal was preferred to Her Majesty in Council, and on the 12th of December, 1873, the decision of the High Court was reversed, and the decree of the first Court established, namely, that the Plaintiffs were to recover a sum of Rs.25,200 from *Modhoosoodun* and the other Defendant. In the meanwhile *Modhoosoodun* had died, and the decree in the Privy Council was against his widow, as his representative, that the Rs.25,200 should be recovered from her. Subsequently an application was made to the District Court of *Midnapore* to execute the decree, and certain property was attached which the present Appellant claimed as his separate property. Only a very small portion of it was held liable to the decree, and the rest was ordered to be given up. Upon that the present suit was instituted for the purpose of trying whether the Plaintiffs had not a right to execute their decree against the property mentioned in the attachment, and which had been ordered to be given up The Plaintiffs, however, did not rely merely on the fact that they had obtained the decree, and that the property was liable to be seized; but they made a further allegation, and stated that "*Gooroo Das Pyne*," the present Appellant, and the Defendant in the suit, "was benefited by the aforesaid timber taken by the kurta *Modhoosoodun*, and, after the death of *Modhoosoodun*, himself sold the aforesaid timbers, and appropriated the moneys obtained by the sale of the aforesaid timbers, and regularly conducted the aforesaid case. Both the brothers are, for the reasons mentioned above, answerable under the decree we have obtained in the aforesaid case for the afore-mentioned acts, although the name of *Modhoosoodun* alone was mentioned in that decree; and therefore we are fully entitled to realise the whole amount by the sale of the properties of both the brothers." Strictly speaking, the claim was to realise the decree from the property of the Defendant. The first Court held that a portion of the property which was claimed by the Defendant was liable to the execution, but that a great portion of it was not. Upon that an appeal was preferred by the Plaintiffs to the High Court, and notice of objections was

given by the Defendant. The High Court held that notwithstanding the sale of the timber by the Defendant, and his receipt of the assets which were derived from the sale, he was not liable to have his property attached and sold under the execution against his brother; but they went on, and said:—"But although the Plaintiffs have been ill-advised in bringing their suit in the particular form adopted by them, and though we are unable to give them the particular form of relief desired, we think that on the facts proved we ought if we can, and that we are able to grant them such relief as they would have been entitled to obtain on a properly drawn plaint." It is quite clear that in this case the Plaintiffs did rely in their plaint upon the fact that the Defendant had sold the timber, and had received the proceeds.

That the Defendant understood the plaint as intending to make him liable is clear, for in his answer he says:—"Afterwards the case of the Plaintiffs was dismissed by the Honourable High Court; and an order being passed to release the timbers from attachment, I, according to the permission of *Moti Dasi*,"—that is, the widow of *Modhoosoodun*,—"sold the timbers and paid her the moneys that were realized by the sale of the timbers, and took a receipt, and she repaid me the moneys I had expended. But the Plaintiffs, notwithstanding these facts, are unjustly placing upon me the liability by falsely alleging that I, as a sharer, conducted the aforesaid suit, and that I myself took the moneys realized by the sale of the timbers." He knew that the Plaintiffs intended to make him liable because he had taken the moneys realized by the sale of the timbers. It is found by the first Court that "The payment of money to *Moti Dasi* being disproved, it must be presumed to be in the hands of the Defendant, who is the active male member of the house." Therefore, according to that finding, the money which was the proceeds of the sale of the timber was in the Defendant's hands, and the Plaintiff by his plaint shewed that he intended to make the Defendant responsible because he had got the assets which were produced from the sale of the timber.

Then the judgment of the High Court proceeds thus:—"It is quite clear that, *Modhoosoodun* having misappropriated the Plaintiffs' timber, the value of the same came into the hands of *Gooroo*

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Das his brother, whence it ought to have passed into the hands of *Moti Dasi*, and from her the Plaintiffs might have obtained it in execution of their decree. We find on the facts that *Gooroo Das* has retained the Rs.22,000 received by the sale of the timber; and this money is the Plaintiffs' property. If a portion of it has been invested in the lands which Plaintiffs seek to sell, then such lands belong to them in equity. Whether *Gooroo Das* has appropriated the money without the consent of *Moti Dasi*, or whether he has done so in collusion with her with the object of defeating the Plaintiffs' attempt to execute their hardwon decree, the Court ought to compel him to disgorge the amount. We therefore set aside the decree of the Lower Court, and in lieu of it we make a decree with costs in favour of the Plaintiffs against the Defendants jointly and severally for the sum of Rs.22,000, which Plaintiffs will be entitled to realize in execution." They therefore give against the two Defendants, the present Appellant and the widow, a decree for the Rs.22,000, which was the amount which the Defendant had received, and which they find that he held from the proceeds of the timber of the Plaintiffs.

Their Lordships think that the Plaintiffs had a right to follow the proceeds of their timber, and, the Defendant having received the money, and not having paid it over to *Moti Dasi*, they have a right to recover the amount from him.

Mr. *Doyne* has contended, and certainly there was a good deal of weight in his argument, that a suit to recover the amount would have been barred by limitation. He said that the timber was sold as far back as the year 1870, that this suit was brought in 1876, and that consequently nearly six years had expired. He contended that if the Defendant was liable to the Plaintiffs, he was liable only for money had and received to the Plaintiffs' use. He relied upon article 48 of the second schedule of Act IX. of 1871, and also upon article 60. Article 48 is, "For moveable property acquired by theft, extortion, cheating, or dishonest misappropriation or conversion." Their Lordships think that the case does not come under that article. There was no dishonest misappropriation or conversion. The Defendant sold the timber on account of his brother; he held the proceeds on account of the widow; and there was no dishonest misappropriation, although

the Plaintiffs had a right, finding the money in his hands, to attach it and make him responsible to them.

Article No. 60 is, "For money payable by the Defendant to the Plaintiff; for money received by the Defendant for the Plaintiff's use." Mr. *Doyne* contended that in this case the money was received for the Plaintiffs' use when the Defendant sold the timber in May, 1870; but that appears to their Lordships not to be the case. When he sold the timber he was selling it as the agent of *Moti Dasi*, and he received the money for her. The suit is to enforce an equitable claim on the part of the Plaintiffs to follow the proceeds of their timber, and, finding them in the hands of the Defendant, to make him responsible for the amount. That does not fall either within articles No. 60 or No. 48; but comes within article 118 as "a suit for which no period of limitation is provided elsewhere in this schedule," and for suits of that nature a period of six years is the limitation. Their Lordships think that the Plaintiffs had a right at any time within six years from the time when the Defendant received the money to hold him responsible to them for the amount as long as it remained in his hands: they might have given him notice not to pay it over, and held him responsible in equity if he had done so.

Their Lordships will, therefore, humbly advise Her Majesty that the decision of the High Court be affirmed and this appeal dismissed. As no appearance has been entered for the Respondent, there will be no costs of this appeal.

Their Lordships think it right to add a declaration that any money which may be recovered under this decree shall be treated in part satisfaction of the former decree against *Modhoosoodun* or his widow, in the same way as if it had been levied under that decree, and *vice versâ*.

Solicitors for Appellant: *Lambert, Petch, & Shakespear.*

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JUGOL KISHORE . . . . . PLAINTIFF;

AND

MAHARAJAH JOTINDRO MOHUN TAGORE AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

CONSOLIDATED APPEALS.

Hindu Widow—Right, Title, and Interest of Widow—Sale of Widow's Estate as representing her Husband.

By Hindu law the husband's estate vests in his widow absolutely for some purposes, though in other respects for a qualified interest.

When a Hindu widow's right, title, and interest is sold in execution of a decree, the Court is at liberty to look to the judgment to ascertain what was sold thereunder.

Where it appeared from the judgment that the decree against the widow was in respect of the husband's estate, and bound the reversionary heir, *held*, that the purchaser of her right and interest in execution took the estate absolutely.

CONSOLIDATED appeals from a judgment of the High Court (April 29, 1881), and from decrees based thereon, whereby the suits of the Appellant were dismissed with costs, reversing decisions of the Subordinate Judge of *Nuddea* (September 12, 1879).

This consolidated appeal arises out of the decisions in two original suits, 63 and 64 of 1878, which were preferred in respect of the Plaintiff's alleged interest in two pieces of property. The right claimed was a share in each of those properties, which originally belonged to one *Norendro Chunder Roy*, and which share on his death passed to his widow, *Sharodamoyi*. It was admitted that in 1866 all *Sharodamoyi's* interest in this property was sold in execution of a decree against her by one *Umamoyi*, and purchased by the latter, and that the Respondents were the assignees in possession of all the rights so obtained by *Umamoyi*. *Sharodamoyi* died in 1869, and it was alleged by the

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

Plaintiff that on her death all *Norendro Chunder's* interest in the property passed to his brother and heir, *Behari Lall.* In 1870 *Behari Lall's* interest in the property was sold in execution, and was purchased by one *Ramdhun Chetlangia,* who assigned it in 1878 to the Plaintiff. Neither *Behari Lall, Ramdhun,* nor the Plaintiff ever had possession of the land now in dispute.

The first Court held that, under the execution in 1866, *Umamoyi* only purchased the life interest of *Sharodamoyi,* and that the Respondents had no title as against the Appellant who purchased the interest of *Behari Lall,* the heir in reversion. The High Court held that under the execution sale in 1866, the entire interest in *Norendro Chunder's* share passed to *Umamoyi,* and vested in the Respondents.

The facts appear in the judgment of their Lordships.

The judgment of the High Court (*Garth,* C.J., and *McDonell,* J.) was as follows:—

"The main question in the case is whether, under the sale of the right, title, and interest of *Sharodamoyi* in her share of the family property, the whole inheritance in that share passed to the purchaser, or only his widow's interest, subject to the right of the reversionary heir to succeed to the property at her death.

"It is contended on the part of the plaintiff that whatever the original object of *Umamoyi's* suit may have been, the decree which she eventually sought to enforce by execution as against *Sharodamoyi's* share of the property was a mere money decree of a personal nature for mesne profits and costs, and that consequently the sale under that decree could only pass *Sharodamoyi's* interest, and could not affect *Behari's* rights, as the reversionary heir after *Sharodamoyi's* death.

"On the other hand, it is contended by the defendants that the express object of *Umamoyi's* suit was to recover from all the defendants in the suit, and amongst them, from *Sharodamoyi,* the whole of *Umamoyi's* share in the ancestral property. It was not brought to recover from *Sharodamoyi* merely her own life interest, but the entire estate, in the share which had been held by her husband *Norendro* under the hibanamah, and that the decree which was made against *Sharodamoyi* for the recovery of that

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share, included not only *Sharodamoyi's* life interest, but the interest which *Behari* would have taken as reversioner if *Umamoyi* had failed in her suit.

"A somewhat nice question is thus raised for our determination, and several authorities have been cited on either side.

"One point, which has been strongly urged upon us on behalf of the plaintiff, is this, that whatever might have been the nature of the decree obtained against *Sharodamoyi* and the other defendants, as in execution of that decree, her right, title, and interest only was sold in the property in question, the sale would only pass her life interest, and would not affect the interest of *Behari* after her death.

"We think, however, that this proposition is opposed both to principle and authority. It has been held over and over again, not only in this Court, but by the Privy Council, that the words 'right, title, and interest' of the execution debtor must not be construed strictly, but with reference to the circumstances under which the suit is brought, and the true meaning of the decree under which the sale takes place, and this was the more necessary in the case of sales which took place under the old *Civil Procedure Code*, because by sect. 249 of that Code the proclamation in every case was for the sale only of the interest of the execution debtor, and, as a matter of form and of practice, all sales under that Act were of the right, title, and interest of the execution debtor. It is therefore the duty of the Court in each case to ascertain carefully what was intended to be sold.

"Perhaps the most remarkable instance of the application of this rule occurs in the case of *Ishan Chunder Mitter* v. *Buksh Ali Soudagur* (1), which has been more than once cited with approbation by the Privy Council. In that case a widow had been sued upon a bond given by her husband, and it appeared upon the proceedings that the suit was really brought against her, not in her own right, but as the guardian of her infant son, who was his father's heir. A decree was obtained against her in the suit, and under that decree her right, title, and interest in the property in question was sold to a purchaser. Now, here the widow had in fact no right, title, or interest in the property in question. That

(1) Marsh. Rep. 614.

property belonged wholly to her son, and yet it was held that under the sale of her right, title, and interest the property which belonged to her son passed to the purchaser.

"Again, as an authority to the same effect, we may refer to the case of *The General Manager of the Raj Durbhanga* v. *Maharajah Ramaput Singh* (1). There a suit had been brought by *A.* against *B.* for arrears of rent, and *B.* having died pending the suit, a decree was obtained by *A.* against *B.'s* widow. In execution under this decree the right, title, and interest of *B.'s* widow in certain property which had belonged to her husband was sold. In point of fact, the widow had no interest in that property, because it belonged to her husband's son and heir; but the Privy Council held, reversing the decree of the High Court, that under that sale the property which was then vested in the son passed to the purchaser.

"Again, as an illustration of how the words 'right, title, and interest' may have a different meaning according to the nature of the suit and of the decree under which the sale takes place, we may refer to the case of *Bisto Beharee Sahoy* v. *Lalla Byjnath Pershad and Others* (2). There a suit had been brought, and a decree obtained against a widow for a debt, and in execution of that decree, her right, title, and interest in certain property which she had inherited from her husband had been sold. The reversioner then brought a suit to dispute the validity of the sale as affecting his interests, and it was held that the right of the reversioner to the property after the widow's death depended upon whether the debt had or had not been incurred by the widow for any necessity contemplated by Hindoo law.

"The learned Judges say, If such necessity had been established, her right and interest would have included the entire estate, which would have passed under the decree to the purchaser in execution; whilst if she had sold without such necessity, then all that would have passed under the sale would have been her life interest, thereby clearly indicating that under the sale of her right, title, and interest, a different estate would have passed to the purchaser according to whether her debt had been incurred with or without legal necessity.

(1) 14 Moore's Ind. Ap. 605. (2) 16 Suth. W. R. 50.

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"We think, therefore, that we must look to the nature of the suit and of the decree against *Sharodamoyi* to see whether, under the sale of her right, title, and interest in the property in question, her own life interest only, or the whole inheritance passed to the purchaser.

"And this, we think, must depend upon whether the suit was brought against her upon a cause of action personal to herself, or one which affected the whole inheritance of the property in suit. This is the principle, as we understand, upon which the case of *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (1), was decided. The test applied in that case was whether the decree for maintenance was a personal one against the widow, or whether it affected the estate of the reversioner, and as the Privy Council considered that the decree was a personal one against the widow, it was held that under the sale of her right, title, and interest in the property sold, her own life interest only passed to the purchaser.

"Now, applying the same test in this case, we think it clear that *Umamoyi's* suit was not against *Sharodamoyi* personally. Her object was to recover back from *Sharodamoyi* and the other defendants in the suit her father's inheritance in the ancestral property of which she had been dispossessed by the other members of the family under colour of the alleged hibanamah.

"The suit was defended in the interest of *Behari*, the reversioner, as well as of *Sharodamoyi* herself. It was defended successfully in the Court of first instance, and there is no reason to suppose that the defendants did not all honestly believe that the hibanamah was a genuine instrument.

"The reversioner *Behari* was just as much interested as *Sharodamoyi* in the result of the suit. It was defended for his benefit as well as hers, and the costs which were decreed against her were the costs incurred by the plaintiff, not in prosecuting the claim against her personally, but also against the reversioner, whose right she was bound to defend, and did defend, in resisting *Umamoyi's* claim to the inheritance."

Doyne, and *Woodroffe*, for the Appellant, contended that the

(1) Law Rep. 2 Ind. Ap. 275.

decree, in execution of which the sale of 1866 took place, purported to proceed upon a cause of action accruing after *Norendro Chunder's* death, and against his widow *Sharodamoyi* personally. If the Respondent were entitled to go behind that decree, it was contended that no legal necessity had been shewn to have existed for the transaction so as to bind the reversionary heir.

Cowie, Q.C., and *Mayne*, for the Respondents, were not called upon.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

Their Lordships are of opinion that the decision of the High Court is correct, and that it ought to be affirmed.

The suits out of which these appeals arise relate to the share in certain joint family property which belonged to *Norendro Chandra*, deceased.

The Defendants claim through a sale in execution of a decree against *Sharodamoyi*, the widow of *Norendro*, who had succeeded to his share.

The Plaintiff claims under a purchaser at a sale after the death of *Sharodamoyi* of the alleged interest of *Behari Lall*, as reversionary heir of *Norendro* in the said share, in execution of a decree against *Behari Lall*.

The main question in the case is, as stated by the Chief Justice in delivering the judgment of the High Court, "whether under the sale of the right, title, and interest of *Sharodamoyi* in her share of the family property, the whole inheritance in that share passed to the purchaser, or only the widow's interest subject to the right of the reversionary heir to succeed to the property at her death." If the whole inheritance passed under the sale in execution of the decree against *Sharodamoyi*, then the Plaintiff is not entitled to succeed. If, on the other hand, the only interest that was sold under that decree was the qualified interest, which is usually called the widow's estate, then the reversionary heir was not bound by it, and the claimants under the purchase at the sale in execution of the decree against him are entitled to succeed.

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The suit in which the decree against the widow *Sharodamoyi* was obtained was brought by *Umamoyi*, who was the daughter of *Bhoirub Chandra*. She brought a suit against the other members of the joint family to recover the share of the property which belonged to her father, who in his lifetime was a member of the joint family. *Bhoirub* having died without parting with his interest, *Umamoyi*, as his daughter, became entitled to his share of the property; but some of the members of the joint family set up that *Bhoirub*, before his death, had executed a hibanamah by which he conveyed his share to them. *Sharodamoyi* and the other members of the joint family, including *Behari Lall*, were made co-defendants. The record is very defective in many respects. It includes a number of valuations and other documents which are wholly unnecessary for the purposes of this case, and it omits many documents which were very important to be looked at. *Sharodamoyi*, though made a party to the suit, did not appear. Other members of the family appeared, and set up as a defence to the suit that *Bhoirub Chandra* had conveyed his share by the hibanamah. The First Court dismissed the suit, holding that the hibanamah was a genuine document. Upon appeal to the Sudder Court, that Court held that the hibinamah was not a valid document or binding upon *Umamoyi* as the daughter of *Bhoirub Chandra*; and they reversed the decision of the First Court, and decreed that *Umamoyi* should recover her share of the property, together with mesne profits and the costs of the suit. It was urged in the course of argument that *Sharodamoyi* never received those mesne profits; but it is unimportant whether she did receive them or not. She was made a party to the suit and did not appear. The other Defendants appeared and set up a defence, and it was by reason of that defence that the principal part of the costs in that suit were incurred. *Sharodamoyi* not having appeared, she was not represented at the trial, but the case was tried *ex parte* against her upon the evidence which was produced by the other members of the family. Upon that defence the Sudder Court gave a decree against all the Defendants. If in the execution of that decree *Umamoyi* had attached and sold the right, title, and interest of all the other members of the family, although one portion of it was represented by the widow, the

whole property would have passed to the purchaser The reversionary interest of *Behari* would have passed although the share of *Norendro* was represented by the widow. If that would have been the case if the execution had been against the whole property, why should not it be so when the execution was against only the widow's share of the property? The first Judge held that under the execution against *Sharodamoyi* the reversionary interest of *Behari Lall* could not have been sold. He was quite right in that respect, because *Behari Lall* during the widow's life had no reversionary interest to sell; but it was a strong reason why when the sale was against the widow, who represented her deceased husband's share, the whole interest in the estate should pass under it. It was held in the *Shivagunga* case, that although a widow has for some purposes only a partial interest, she has for other purposes the whole estate vested in her; and that in a suit against a widow in respect of the estate the decision is binding upon the reversionary heir. Their Lordships, in that case (1), say: "Assuming her,"—that is the widow,—"to be entitled to the zemindari at all, the whole estate would for the time be vested in her absolutely for some purposes, though in some respects for a qualified interest."

A difficulty was caused by sect. 249 of Act VIII. of 1859, which enacted that the proclamation of a sale in execution shall declare "that the sale extends only to the right, title, and interest of the Defendant in the property specified therein." In the case of a widow it is necessary that the proclamation shall make that statement. But then there are many cases in which when the right, title and interest of the widow is sold the whole interest in the estate passes. In other cases the whole interest does not pass. The case depends upon the nature of the suit in which the execution issues. There are many authorities to that effect. It is unnecessary to recapitulate them,—they are referred to by the Chief Justice in his judgment in the High Court. If the suit is simply for a personal claim against the widow, then merely the widow's qualified interest is sold, and the reversionary interest is not bound by it. If, on the other hand, the suit is against the widow in respect of the estate, or for a cause which is not a mere

(1) 9 Moore's Ind. Ap. Cas. 604.

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personal cause of action against the widow, then the whole estate passes. In many of the cases, although the right, title, and interest of the widow had been sold, the whole interest in the estate was held to have passed and the reversionary heir to be bound by it.

In the case referred to, which is reported in Law Rep. 2 Ind. App., p. 275, *Baijun Doobey and Others* v. *Brij Bhookun Lall Awusti*, it was held that only the widow's qualified estate passed by the sale in execution. That was a suit brought against a widow for arrears of maintenance. It was stated in the judgment that the maintenance was a charge upon the inheritance; but the Judicial Committee held that the claim against the widow was for a personal debt due by the widow; although the maintenance might be a charge upon the inheritance, still the widow whilst in possession of the estate had received the profits and failed to pay the maintenance. The arrears created a personal claim against the widow for which she was personally liable. The Judicial Committee hold that the suit was to enforce the personal liability of the widow, and consequently that the execution in that suit passed merely the widow's interest.

Their Lordships think that upon the authorities referred to by the Chief Justice the Court was at liberty to look to the judgment to ascertain what was sold under the right, title, and interest of the widow. Looking to that in the present case, their Lordships are of opinion that not only the widow's right but the whole interest in the estate passed under the sale in execution of the decree.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the decrees of the High Court; and the Appellant must pay the costs of these appeals.

Solicitors for Appellant: *Sanderson & Holland.*
Solicitors for Respondents: *Miller, Smith, & Bell.*

RAO BAHADUR SINGH . . . . . PLAINTIFF;

AND

MUSSAMATS JAWAHIR KUAR AND PHUL KUAR . . . . . DEFENDANTS.

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Feb. 15, 16.

ON APPEAL FROM THE COURT OF THE COMMISSIONER OF AJMERE.

Succession in Rajpootana—Death of Holder without Issue.

Case in which it was held upon the evidence and authorities, no positive rule of law existing in *Rajpootana* on the subject, that the estate in suit, which was held in hawalah tenure, was not resumable by the patwir thakur merely because the holder died without issue and without adopting an heir.

APPEAL from a decree of the Commissioner of *Ajmere* (March 15, 1879), which reversed the decree of the Assistant Commissioner (June 14, 1877), and dismissed with costs the suit which the Appellant had instituted in the First Court.

The Appellant (in the record styled at times the Rao, and at others the Patwi and Istimrardar), is the chief and recorded proprietor of the impartible taluka of *Masuda*, in the district of *Ajmere*, and sued the Respondents, who are the childless widows of one *Balwant Singh*, to resume possession of a village called *Nandwara*, with its appurtenant hamlets, which form part of taluka *Masuda*, and had been given for his maintenance some generations back to the ancestor of *Balwant Singh*. By his plaint this Appellant claimed the customary right, as proprietor of the taluka, to resume at will all grants of land made out of it for the maintenance of the younger branches on making other sufficient provision for their maintenance. And he averred his readiness to make such provision for the Defendants, and their refusal to accept it and to give up the lands in suit, and asked for a decision and a decree establishing his alleged right.

* *Present*:—LORD BLACKBURN, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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The Defendant widows raised a number of defences, to try which, fourteen issues were recorded. Among the Defendants' allegations was, that their deceased husband, *Balwant Singh*, was not without issue, inasmuch as he had given permission for the adoption of one *Ram Singh*, who had been accordingly adopted, and with the consent of the Plaintiff.

The first Court in effect held that no adoption which could affect this Appellant, or any valid adoption, either according to the ordinary Hindu Law or the custom of this family, was proved by the Defendants, and that the evidence for the Plaintiff did, under the 13th issue, establish by various instances the right in any case of the chief of *Masuda* to resume the village held by the deceased for maintenance, making proper provision for the maintenance of his widows and daughters, if any.

The Commissioner of *Ajmere*, after reference to and obtaining the opinion of the Chief Commissioner of the district, in accordance with that opinion reversed the decision of the first Court.

His judgment was as follows:—

"In this case the Chief Commissioner has, under a reference made to him under sect. 36 of the *Ajmere* Courts Regulation, found that the patwi thakur is not, under the circumstances set forth in the reference made under date of the 13th of February, 1878, entitled to annex the land to his own estate, merely because the holder died without adopting an heir, except under special circumstances, and that such special circumstances are in the present case absent; accordingly this Court, under sect. 37 of Courts Regulation, must dispose of the case in conformity with the ruling of the Chief Commissioner, and consequently this Court accepts the appeal and reverses the order of the Lower Court. The Plaintiff will pay the costs of the litigation from the commencement to the end."

The finding of the Chief Commissioner was made after obtaining "opinions from the more influential durbars as to the customs in like cases in neighbouring States."

It was as follows:—

"In *Rajpootana* no positive rule of law exists on the matter

but there is no doubt that the patwi thakur is not entitled to resume an estate held as *Nandwara* was held, merely because the holder died without adopting an heir. To lay down that he is so entitled would be to establish the doctrine of lapse by default of heirs, whenever an estate holder dies without adopting, and this would not be a valid ruling for *Rajpootana*, while the consequences might be as prejudicial to the superior as to the inferior *Rajpoot* landholders. Such a doctrine has never prevailed, and it would certainly be contrary to the feelings and traditions of *Rajpoot* clans in regard to the tenure of their lands.

On the other hand, there can be no doubt whatever that the decease of a landholder, before he has adopted an heir, is universally held to give his superior a right to interfere in the succession to superintend the devolution of the estate, sometimes even to dictate it, and to choose an heir, but he cannot annex the land to his own estate except under special circumstances.

What these circumstances are I do not consider it necessary to define precisely, as they are absent in the present case, and are not therefore material to an adequate consideration of it."

Leith, Q.C., and *Doyne*, for the Appellant, contended that the First Court rightly held on the evidence that the pât grant of *Nandwara* was resumable at will on provision being made for the maintenance of the grantees.

The opinion of the Chief Commissioner and the decree of the Commission were not founded upon evidence taken in the suit, but upon replies and opinions given behind the backs of the parties as to the varying customs of other States. The question has not been considered or decided by them whether by the custom of this family the Appellant was entitled to resume *Nandwara* at will.

The Respondents did not appear.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This is an action by the Rajah of *Masuda*, in the *Rajpootana* district, for the purpose of recovering possession of a subordinate

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estate within the taluka of *Masuda*, consisting of the village of *Nandwara* with two or three hamlets appurtenant to it, against the widows of the last owner, *Balwant Singh*, who died without natural issue. The plaint avers that,—"The subject-matter of the claim is that the Plaintiff is the proprietor of the taluka of *Masuda*, and by old-established custom, like his predecessors, enjoys the right to resume at any time any village assigned to any of his brethren for maintenance, and to provide for them in some other way." His case is that this sub-taluka, as it may be called (though it is sometimes called a jaghire), had been granted, some hundred years ago, to an ancestor of *Balwant*, the last owner, for maintenance; and that he is entitled at any time to resume it upon providing pecuniary maintenance for the tenants for the time being. This contention has scarcely been attempted to be supported. The Plaintiff therefore falls back upon the circumstances of this case and a more limited right; namely, a right to resume upon the death of the tenant without issue. The question is whether he has established this right.

In the suit a question was raised as to whether the widows had adopted a son in pursuance of alleged directions of their husband; and further whether, assuming that no such directions had been proved, the Rajah had by his conduct recognised the adoption. These questions have been found against the Defendants by the Lower Court; and that finding, though not in terms affirmed, appears in substance to have been adopted by the Court above, and it is in favour of the Appellant.

The Defendants denied that the grant was for the purpose of maintenance, alleging it to have been made in pursuance of some family arrangement or partition, and they denied the right claimed by the Rajah and most of the allegations in the plaint. The case came, in the first instance, before the Assistant Commissioner of *Ajmere*, who gave an elaborate judgment upon a number of issues which have become immaterial. The material finding is upon issue 13, viz.:—"Whether the Rao of *Masuda*, as head of the family, has the right to confiscate the tenure of *Nandwara*—(*a*) in spite of a legal adoption?"—that may be put aside; "(*b*) in spite of the existence and presence of a natural heir?" Here it may be stated that there is no dispute that *Ram Singh*, who was

alleged to be adopted, would be the next heir to *Balwant* in the ordinary course of descent. The finding of the Assistant Commissioner is in these terms:—"I feel bound to decide this issue in the affirmative, and to decide that the Thakur of *Nandwara*, having died without a legitimate heir of the body, the chief of *Masuda* is entitled to resume the village, making proper provision for the maintenance of the widows, and if there be any daughters, then of the daughters also, of the deceased. The evidence before the Court goes to shew that confiscations have occurred frequently in former times, sometimes because the minor chief died childless." The case went on appeal to the Commissioner of *Ajmere*. The Commissioner, not himself deciding the suit in the first instance, stated a case for the consideration of the Chief Commissioner. The Chief Commissioner directed various inquiries to be made of certain durbars of native princes. They reported to him; and, after considering their reports, he expressed his opinion that the judgment of the Assistant Commissioner should be reversed, and found that no such custom and no such right as that which the Rajah claimed existed. The Commissioner, acting on this opinion, reversed the judgment of the Assistant Commissioner. This appeal is preferred from the judgment of the Commissioner.

Documentary and oral evidence have been given, to which it is unnecessary to refer at great length. The first important evidence consists of certain depositions which appear to have been taken before Mr. *Cavendish* in the year 1829, Mr. *Cavendish* being then Superintendent of *Ajmere*, and apparently charged with the duty of obtaining information with respect to tenure in *Ajmere* for the use of the Government. Various depositions have been put in, which were used before him. One or two of those depositions, which are very short, go the length of supporting the contention of the Plaintiff; but that is by no means their uniform tenor. There are others which qualify his right. There are some which state that, although he has a right to resume an estate, it must be upon substituting for it another estate. It is to be observed that *Bahadar Mal*, who probably represented him on that occasion, because he speaks of him as

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his client, being asked, "What powers does your client (the Istimrardar of *Masudah*) have with regard to the ejectment of the jagirdars?" answers, "In case of disloyalty, insurrection, and impropriety of conduct on the part of any jagirdar, my client can turn him out of the village; but if he shew no disobedience he may be allowed to continue in possession of his village as usual, or at his request my client may exchange his village for another, or fix a cash allowance." So it appears that the person who represented the Rajah on that occasion claimed no such right as that on which he bases his present suit, but simply a right of resumption for cause. Further, it would appear that all these depositions are given upon the hypothesis of its being shewn that the grant originally made to the jagirdar was a grant merely for maintenance; but that appears to their Lordships not to be established, the finding of the Assistant Commissioner on that subject being at least ambiguous, viz.:—"That the grant of *Nandwara* to the ancestors of the deceased thakur was an ordinary grant in 'gras' or 'hawalah' tenure: no evidence has been produced to rebut this natural presumption. The word 'bhaibat' has not been exactly defined or interpreted by the defence, and is a term which is vague in its meaning." Such a finding does not appear to shew that the grants were necessarily grants for maintenance, neither of these terms necessarily importing maintenance. If that be so, the evidence does not directly bear upon the question. However, assuming that the grant was made for maintenance, still these depositions do not, as a whole, amount to proof of the right claimed.

The next documentary evidence relates to a proceeding in 1853 before Colonel *Dixon*, which arose in this way: The tenant of *Jamola*, one of the dependent jagirdars, had refused to pay road cess, and had in other ways offended the Rajah. The Rajah thereupon claimed to resume possession of *Jamola*; and, in order to establish his case, he applied to various other jagirdars,—among others he applied to the father of *Balwant*—to give a deposition or statement in his favour. He wrote to them this letter: "You need not entertain any apprehension on account of the letter which I got you to write in the *Jamola* case. The

signature formerly attached (to certain writings) by *Bhopal Singh* (the grandfather of the present Thakur of *Shergarh*), both at the time of the dispute regarding *Ramgarh* and the assessment made by the Honourable *R. Cavendish*, shall be respected. Moreover, you will be put to no inconvenience whatever; don't think it otherwise. I am at one with you. Should I act otherwise, God is between us, *i.e.*, between yourself and myself." The substance of this letter, which is spoken to by one of the witnesses, rather points to this, that the Rajah asked these persons, who were to a certain extent dependent upon him, to sign a paper on the understanding that it would be of advantage to him and no detriment to themselves. Under those circumstances they did sign a paper, which is to this effect: "After usual compliments. By the grace of God we are all well, and trust that, by the blessing of God, this will also find you in good health. You are (our) master. You ask for our opinion in the matter of the application filed by the Thakur of *Jamola*. We accordingly beg to state that we are all members of your family, and look to you for our support. We have no (adverse) intention as regards the villages which you may confiscate, if you intend to do so, as you are our master. What we ask is only bread; you may confiscate the villages if you like." This and the letter which has just been read are nearly contemporaneous. Their Lordships, under the circumstances, do not attach any great importance to this declaration.

A great deal of verbal evidence also has been adduced; but it is by no means of uniform character or all of it supporting the contention of the Plaintiff. The first witness, a zemindar, who seems to be a man of position, aged sixty years, gives this view of the right claimed: "For fault shewn, the masudah patwi has power to resume villages given as hawalah. I cannot say what power the patwi has to so resume in the absence of fault."

Without going through all this evidence, it appears to their Lordships that, although several cases of what is called confiscation or resumption are shewn, they have been, in almost every instance, from some fault or other. There is one instance indeed in which a jaghire is resumed upon the owner dying without issue, but in that case it happened that the Rajah was the nearest heir.

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There appears to their Lordships no sufficient evidence to support the finding of the Assistant Commissioner that the Rajah had the right in the first of the three cases which he puts, namely, in the case of the minor chief dying childless, to confiscate or resume the estate. The opinions of the durbars, which were taken by the Chief Commissioner, are, on the whole, adverse to any such right; two are distinctly adverse to it, and two are equivocal. Their Lordships, having regard to the opinion of the Chief Commissioner, who states that "In *Rajpootana* no positive rule of law exists on the matter, but there is no doubt that the patwi thakur is not entitled to resume an estate held as *Nandwara* was held merely because the holder died without adopting an heir,"—supported as that finding is, to some extent certainly, by the answers which were received from the neighbouring durbars, and, on the whole, by the balance of evidence in the case—are of opinion that the judgment of the Commissioner of *Ajmere* should be affirmed.

They will therefore humbly advise Her Majesty that that judgment be affirmed, and this appeal be dismissed.

Solicitors for appellant: *W. & A. Rankin Ford.*

NAROTAM DAS . . . . . PLAINTIFF;

AND

SHEO PARGASH SINGH . . . . . DEFENDANT.

J. C.*
1884.
Feb. 5.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Oudh—Act XXIV. of 1870, *sect.* 4, *cl.* 3—*Invalidity of Mortgage by Talukdar.*

Held, that a mortgage bond which contains no personal contract to pay out of the mortgagor's personal estate, but is a mere contract to pay out of the hypothecated taluka, which at the date of the bond was under the operation of the *Incumbered Estates Act* (XXIV. of 1870), is invalid under sect. 4, cl. 3.

APPEAL from a decree of the Judicial Commissioner (Oct. 13, 1881), which dismissed with costs an appeal from a decree of the District Judge of *Fyzabad* (April 19, 1881).

The suit was brought on the 8th of December, 1880, to recover Rs.10,981 15*a.* 6*p.* upon a mortgage bond, dated the 18th of July, 1873, whereby the Respondent purported to hypothecate the whole of his property in taluka *Chandipur Birhar*, to secure repayment of Rs.4100, with interest at Rs.1 8*a.* per mensem, or 18 per cent. per annum, within two years, interest to continue at the same rate until repayment.

The Respondent was the talukdar of *Chandipur Birhar* in district *Fyzabad*, and his taluka was taken under the management of the Government according to the provisions of the *Oudh Talukdars' Relief Act* (XXIV. of 1870), from November, 1872.

The bond was as follows:—

"I have by this instrument hypothecated the whole of my property in taluka *Chandipur Birhar*, situate in *Fyzabad* district. As the aforesaid taluka of *Chandipur Birhar* is under management under the *Incumbered Estates Act*, and I have already filed in the office of the superintendent a schedule of my debts, specifying the names of my creditors, I do hereby promise and give it

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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in writing, that I shall without any plea repay the principal with interest within the term of two years. The mode of payment will be that after paying up the schedule debts I shall first of all pay up the debt covered by this bond including interest. I shall thereafter appropriate the profits of the estate and attend to the liquidation of other debts. I shall not take the profits of the estate without paying up the present debt with interest, if I do take the profits, it will be for the payment of this debt. I shall until this debt is repaid abstain from contracting other debts from the bank or anywhere else. Should there be occasion for a lawsuit, which God may forbid, the officers of the incumbered estates and other judicial officers will, on the strength of this instrument, incorporate in the decree the whole of the interest accruing due for the past period, even if it may exceed the principal by more than half, or be twice or three times the amount of the principal, as also future interest till the payment in full of the amount of the decree at the same rate of Rs.1 8*a.* per cent. in accordance with the terms of this contract; it shall also be open to the said banker to file a petition and cause the same to be entered in the decree. I myself shall file a petition and have this done, for I have taken this loan on this understanding. When my estate is released from management under the *Incumbered Estates Act*, I will immediately first of all pay the debt due to the said banker, and will pay the other creditors afterwards. In both cases, *i.e.*, while the estate is under management, and after it is released, the repayment of this debt will be the subject of my first consideration. In the event of any breach of contract taking place on my part, the said banker is at liberty to institute a suit within the time fixed in this bond and recover his money. I will not transfer or mortgage to anyone the hypothecated property, till the principal and interest of this debt is paid up; if I do so, it will be illegal. If the said banker sells or mortgages this instrument to anyone, I will continue to maintain the same terms with the purchaser and the mortgagee. These few lines have therefore been written as an unconditional bond, hypothecating my property, so that it may serve as a document and be of use when required.

"*P.S.*—I have taken this Rs.4100, over and above the Rs.3200,

borrowed by me, by hypothecation of the property, by the mortgage-deed attested on the 17th of March, 1873."

At the date of this transaction, the estate in question was under the management of the Government, and both Courts held, under a preliminary issue framed for that purpose, that the bond under which the Appellant sued was invalid, and not binding upon the Respondent.

Woodroffe, for the Appellant, contended that these judgments were wrong, and that the bond in question, in so far as it purported to oblige the Respondent to repay the debt evidenced thereby, was not invalid. Act XXIV. of 1870 did not impose any disability upon the talukdar to contract debts while his immoveable estate was in charge of a manager appointed under the Act. Compare Acts XIV. of 1876 and XX. of 1881, relating to *Sindh*, and Act XVII. of 1873, relating to the Nawab Nazim of *Bengal*. Reference was made to *Lachmipat Singh Dugar* v. *Mirza Khairat Ali* (1). Documents which are invalid for one purpose, say for want of registration, may be good for another. Here, the bond in question is invalid to create an interest in the talukdary, but it creates and evidences a debt.

Doyne, and *Cowell*, for the Respondent, were not called on.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The issue raised in this case is, can the bond be held to be a valid document and binding upon the Defendant when it was executed during the time the estate was under the operation of the *Incumbered Estates Act* (Act XXIV. of 1870)? It is not necessary to consider whether a talukdar whilst his taluka is under management in pursuance of that Act, is competent to make a personal contract, inasmuch as it does not arise in the present case. The question depends upon the construction of the document which is set out in the record, and which their Lordships consider to be a mortgage of the estate and nothing

(1) 4 Beng. L. R. F. B. 19.

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else. It contains no personal contract by the Defendant to pay out of his personal estate, but it is a mere contract to pay out of the hypothecated estate.

The contract commences by stating that he has borrowed the sum of Rs.4100 at a certain rate of interest. Then it goes on: "I have by this instrument hypothecated the whole of my property in taluka *Chandipur Birhar*, situate in *Fyzabad*." There he describes it as an hypothecation. "As the aforesaid taluka of *Chandipur Birhar* is under management under the *Incumbered Estates Act*, and I have already filed in the office of the Superintendent a schedule of my debts, specifying the names of my creditors, I do hereby promise and give it in writing, that I shall without any plea repay the principal with interest within the term of two years." But the contract does not stop there. It goes on:—"The mode of payment will be, that after paying up the scheduled debts, I shall first of all pay up the debt covered by this bond, including interest"—that is to say, that he will pay this bond after he has paid the scheduled debts. "I shall thereafter appropriate the profits of the estate and attend to the liquidation of other debts. I shall not take the profits of the estate without paying up the present debt with interest; if I do take the profits it will be for the payment of this debt. I shall, until this debt is repaid abstain from contracting other debts from the bank or anywhere else." Up to this period it is evidently a mere hypothecation of the estate as a security for the money. Then he says lower down: "When my estate is released from management under the *Incumbered Estates Act*, I will immediately first of all pay the debt due to the said banker, and will pay the other creditors afterwards." That is merely an intention on the part of the borrower that this debt shall be a prior charge upon the estate after payment of the scheduled debts. "In both cases, that is, while the estate is under management and after it is released, the repayment of this debt will be the subject of my first consideration. In the event of any breach of contract taking place on my part, the said banker is at liberty to institute a suit within the time fixed in this bond and recover the money. I will not transfer or mortgage to anyone the hypothecated property

till the principal and interest of this debt is paid up; if I do so it will be illegal." Then he goes on: "These few lines have therefore been written as an unconditional bond hypothecating my property, so that it may serve as a document and be of use when required.

"*P.S.*:— I have taken this Rs.4100 over and above the Rs.3200 borrowed by me by hypothecation of the property, by the mortgage deed attested on the 17th of March, 1873."

Looking at the whole of this deed, their Lordships cannot place any other interpretation upon it than that it was a mere hypothecation of the taluka which was then under management.

Then with regard to sect. 4, clause 3, which says, "that so long as such management continues the talukdar and his heir shall be incompetent to mortgage, charge, lease, or alienate their immoveable property or any part thereof, or to grant valid receipts for the rents and profits arising or accruing therefrom," it appears to their Lordships that this deed being a mere hypothecation of the property, falls clearly within the clause, and consequently that it was invalid. Both the Courts have held that the deed was invalid within the meaning of the Act; and their Lordships think that those decisions are right. They will therefore humbly advise Her Majesty to affirm the decision of the Court; and the Appellant must pay the costs of this appeal.

Solicitors for Appellant: *Watkins & Lattey.*
Solicitors for Respondent: *Barrow & Rogers.*

J. C.*
1884
Feb. 22, 23.

KISHNA NAND . . . . . PLAINTIFF;

AND

KUNWAR PARTAB NARAIN SINGH DEFENDANT.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Limitation—Act XV. of 1877, *Sch. II. Art.* 109 *—Mesne Profits —Wilful Default—Interest.*

Under *Limitation Act* XV., of 1877, sched. II., art. 109, mesne profits can only be recovered for the three years next before the filing of the plaint.

Held, that the Defendant, who had only come into possession of the estate in suit on its being released from the charge of a superintendent appointed under Act XXIV. of 1870, could not be charged with sums which might have been received by the Superintendent but for his wilful default.

There being no rule of law obliging the Court to allow interest upon mesne profits, the discretion of the lower Courts in refusing interest was not interfered with.

APPEAL from a decree of the Judicial Commissioner (Dec. 15, 1881), affirming a decree of the Additional Judge of *Fyzabad* (May 19, 1881), which awarded to the Appellant Rs.5427 with interest at 6 per cent. out of Rs.58,564 claimed by him, with proportionate costs.

The suit was brought on the 26th of July, 1880, to recover the latter amount from the Superintendent of Encumbered Estates, as representing the deceased Maharajah Sir *Maun Singh's* (the *Mehdowna*) estate, being mesne profits of mehal *Dewarya*, in the *Fyzabad* district of *Oudh*, from the 20th of January, 1871, to the date of suit, with interest at 12 per cent. per annum.

The facts are stated in the judgment of their Lordships.

The First Court held (and the Judicial Commissioner affirmed the ruling), on the point of limitation as follows:—

"It appears to me that the law as it at present stands, provided expressly for such cases where the law of limitation worked

* *Present:*—LORD BLACKBURN, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

hardly on the parties, and that it was the duty of the Plaintiff to have moved the Court to provide, in its decree, for the mesne profits from institution of suit till the delivery of possession (sect. 211 of Act X. of 1877), and that, not having done so, the Plaintiff must accept such remedy as remains to him by law. That limitation is three years under art. 109, sched. II. of the *Limitation Act*. I have carefully examined the body of the Act, and can find no section which excludes, in a suit for mesne profits, the period during which a suit for possession is pending. When a Plaintiff seeking mesne profits, has been ousted by a decree of Court, the law (art. 109, sched. II.) does take the period elapsing between this legal but wrongful ouster, and the time when he succeeds in recovering possession, into consideration; but it makes no such exemption when the Plaintiff has been otherwise ousted, as in this case. Some arguments have also been heard as to the items which should come under account, *i.e.*, whether the whole of the profits for the Fusli year, the end of which is within the three years, should be taken into consideration, as the profits do not become payable till the end of the Fusli year; but I am of opinion we must adhere to the letter of the law, and take the actual dates of receipt. I think the law bears hardly on the Plaintiff; but, as I have already pointed out, it appears to me his remedy was to have moved the Court giving him possession to take action under sect. 211 of Act X. of 1877.

"I am aware that this view is open to argument, but as it has been urged before me, and as I understand the law, I can come to no other conclusion. I find that the period of limitation must be held to run from the 26th of July, 1877, and that the items realized subsequent to that date are the only ones which can be claimed."

The material portions of the final judgment of the First Court, were as follows:—

"A variety of issues was fixed; but the last issue, fixed on 2nd of May, 1881, is the one essential to a right ascertainment of the profits. Generally, it may be said to be, what are the mesne profits which Plaintiff can legally recover? The estate was during the whole period held under Act XXIV. of 1870.

"Defendant contends they are only so much as was actually collected in the books of the manager.

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"Mesne profits as defined in sect. 211 of the Civil Procedure Code, include more than actual realisations; they include such profits as the person in possession might with due diligence have received. The person in possession was the manager; and neither the present Defendant, the present talukdar, *Trilokinath*, who was, for a time recognised as such, had any power to collect at all. He having, under Act XXIV. of 1870, been debarred from making any alteration whatever, no want of due diligence can then be asserted against him personally.

"Let us suppose, however, that there was negligence on the part of the management. Can Defendant be held responsible for this? Looking at the terms of Act XXIV. of 1870 I do not see that he can. He was, for the time, absolutely in the hands of the management. He could do nothing himself. He could not, under sect. 23, obtain any redress against the management; and I am of opinion the Plaintiff cannot recover as against Defendant.

"It has, however, been suggested that there has been misappropriation and a receipt by the surburakar for one sum has been filed, which sum does not appear in the management accounts. Even in this case I do not think that the Plaintiff could recover as against the Defendant. He may have a civil, or even a criminal action against the fraudulent subordinate, but not one against the talukdar, or against the manager."

Leith, Q.C., and *Sykes*, for the Appellant, contended that Act XV. of 1877, sch. II. art. 109, was inapplicable.

The case was one of an officer of Government acting as it were judicially and wrongfully taking possession of property: see Act XXIV. of 1870, sect. 3, which did not authorize a wrongful dispossession. The Defendant ought to have been charged with sums which but for wilful default might have been received. Interest should be allowed on such mesne profits as are recoverable: *Chowdhry Wahed Ali* v. *Mussumat Jumaye* (1). The Defendant derived benefit indirectly from the superintendent having had the use of the mesne profits; whereby the incumbrances were the sooner paid off. He was let in so much the earlier and should pay interest.

(1) 19 Suth. W. R. 87.

LORD BLACKBURN :—

Their Lordships will hear the counsel for the Respondent on the subject of interest.

Graham, Q.C., and *Woodroffe*, contended that there had been no such indirect benefit, but that the funds had been employed in resisting the Defendant's lawful claim. Interest on mesne profits would be allowed against a person who is a wrongdoer; not otherwise. The Courts below exercised their discretion, and no ground had been shewn for interfering with it.

Reference was made to *Protab Chunder Borooah* v. *Ranee Surnomoye* (1); *Hurro Durga Chowdhrain* v. *Sharrat Soondery Dabea* (2).

Leith, Q.C., replied.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

The facts of this case are that on the 22nd of May, 1873, the Plaintiff instituted a regular suit for possession of certain villages which are named in his plaint, and he obtained from the Court of the Settlement Officer a decree for sub-settlement right enjoyable for life. This decree was set aside by the first Court of Appeal, which was confirmed by the second Court. The Plaintiff then appealed to Her Majesty in Council, and the decree in his favour was restored, so that he was declared entitled to recover possession of these villages, of which, in January, 1871, the manager under the *Oudh Talukdars Act*, Act XXIV. of 1870, had taken possession, and dispossessed the Plaintiff. The present plaint is entitled *Kishna Nand Misir*, Plaintiff, against the *Mehdowna* estate, Defendant; but it appears from the proceedings that a summons had been issued and served upon the manager of the estate. On the 21st of October, 1880, pending the suit, the estate having been released by the Government, it was asked that a fresh summons should be issued. Although this summons does not appear on the proceedings, it would appear to have been a summons to the present Respondent,

(1) 14 Suth. W. R. 151. (2) Ind. Law Rep. 4 Calc. 675.

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who had been put in possession of the estate on its being released by the Government. His counsel appeared for him before the Judge on the 24th of November, 1880. It may, therefore, be taken that he became the Defendant in the suit. The plaint stated that the Plaintiff, having thus regained possession under the decree of Her Majesty in Council, was entitled to profits from the time of the dispossession and during the pendency of the suit, and claimed mesne profits for nine years. No written statement was put in; but it appears from what was stated by the counsel for the Defendant, when he appeared before the Judge, that the defence raised was that the suit was barred by the law of limitation, except as to the mesne profits for three years before the filing of the plaint; that is, before the 26th of July, 1880. The first Court gave judgment for mesne profits for that period, and refused to allow the mesne profits for the previous time. That judgment was affirmed by the Judicial Commissioner. There was also a claim for interest, which was not allowed; both Courts saying that they did not think it reasonable to allow it.

Upon the appeal to Her Majesty in Council which has now been heard, three questions were raised by the learned counsel for the Appellant. First he contended that under the law of limitation he was entitled to a greater amount of mesne profits than had been allowed. The article 109 of the second schedule of Act XV. of 1877, which was the *Limitation Act* in force at the time when the suit was brought, was referred to. That article is in these terms: "For the profits of immovable property belonging to the Plaintiff which shall have been wrongfully received by the Defendant:—when the profits are received, or, where the Plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession." The learned counsel sought to shew that the dispossession was in the nature of a dispossession under a decree, because the settlement officer, or the manager acting under the *Oudh Talukdars Act*, was acting, as it were, judicially; but when he found that, in the course of the argument, he could not support such a contention, he very properly abandoned it. The question of the law of limitation may be therefore considered as disposed of.

Another question raised was that the Courts had only allowed in the mesne profits for the three years the sums which had actually been received; and it was sought to charge the present Defendant, who was not the person who received the mesne profits, but who had come into possession of the estate upon its being released by the Government, with sums which might have been received except for wilful default. It seems clear that, whatever case might have been made against the manager of the estate, there is nothing to shew that the Defendant could be charged with anything more than was actually received by him. That disposes of the second question.

The remaining question was whether interest ought to have been allowed on the mesne profits for the three years. It is not necessary to say anything upon the question whether in the present state of the law, having regard to the provision in the *Procedure Act*, in which there is an explanation of mesne profits, interest was allowable. In the present case the claim cannot be put higher than that it is a matter for the Court to determine under the circumstances, whether it is reasonable to allow interest. There is no rule obliging the Court to allow the interest. It is a matter in the discretion of the Court, upon the consideration of the facts of the case. In this case both the Courts have considered that it was not reasonable that interest should be allowed; and there are no facts proved which would enable their Lordships to say that this is a wrong decision. Mr. *Sykes* argued that the interest ought to be allowed, because the present Defendant, in getting possession of the estate at an earlier period than he might otherwise have done, has had the benefit of the use of the money. But there is nothing in the evidence to support this, or to shew that it was the fact. The question must be left as it has been decided.

Consequently the decision of the lower Courts ought to be affirmed, and their Lordships will humbly advise Her Majesty to affirm it, and to dismiss the appeal; and the Appellant will pay the costs of it.

Solicitor for Appellant: *T. L. Wilson.*
Solicitors for Respondent: *Watkins & Latley.*

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JONMENJOY COONDOO . . . . . DEFENDANT;

AND

GEORGE ALDER WATSON . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Power of Attorney—Power to sell or purchase does not include Power to pledge—Principal and Agent.

A power of attorney gave to the holders authority "for the purposes aforesaid to sign for me and in my name and on my behalf any and every contract or agreement, acceptance, or other document," the purposes aforesaid being "from time to time to negotiate, make sale, dispose of, assign, and transfer" Government promissory notes, and "to contract for, purchase, and accept the transfer" of the same:—

Held, that upon the true construction of this power the holders were authorized to sell or purchase such notes, but not to pledge them.

Bank of Bengal v. *Macleod* (1) distinguished.

APPEAL from a decree of the High Court (May 4, 1882), reversing a decree of *Wilson*, J. (Dec. 22, 1881) which was in favour of the appellant.

On the 25th of April, 1881, the respondent sued to recover possession from the appellant of a promissory note of the Government of *India* of the £4 per Cent. Transfer Loan 1879 for Rs.20,000, with interest and damages for the detention of the same, on the ground that the said note belonged to him and had been illegally and improperly indorsed and delivered by his attorney and agent to the appellant as security for a loan to his said attorney, and that at the time the Appellant received the same he knew, or by proper diligence might have known, that the note had been pledged for the purposes of the attorney, and that he had no power or authority to pledge the same.

The Appellant answered that the Government promissory note

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) 5 Moore, Ind. Ap. 1; 7 Moore, P. C. 35.

in question was duly and properly indorsed and transferred to him by the attorney and agent of the Plaintiff, acting within the terms and scope of his power of attorney and authority, to secure an advance of Rs.19,000 made by the Appellant to the attorney, and that so far as the Appellant was concerned, the transaction was perfectly *bonâ fide* and in the ordinary and usual course of business.

The facts of the case and the power of attorney appear in the judgment of their Lordships.

Wilson, J., was of opinion that the power of attorney was sufficiently wide to cover the transaction in question in the suit, and that although such transaction was a fraud on the part of the attorney as against the Respondent, yet that there was no reason to say that the Appellant had any knowledge or notice of it.

The material passage in his judgment is as follows:—

"The words of the power are 'negotiate, make sale, dispose of, assign, and transfer, or cause to be procured and assigned and transferred, at their or his discretion, all or any of the Government promissory notes.'

"Several cases have been cited with reference to the construction of powers. They turn on the particular words used, but one case does more—the *Bank of Bengal* v. *Macleod* (1). That case lays down a rule of construction, that words such as these are to be construed disjunctively, so as to give a power to negotiate, a power to sell, a power to assign, and not only to authorize an act which may be described by all these words together.

"The actual words in the case of the *Bank of Bengal* v. *Macleod* (1) were different from these. The decision in that case turned on the word "indorse," which does not occur here. The case of *De Bouchout* v. *Goldsmid* (2) does not assist us in this case. In that case it was held that the power 'to assign, sell, and transfer' stock did not authorize a pledge. That case is perhaps so far an authority that it may shew that the words here used 'assign and transfer' would not themselves authorize a

(1) 5 Moore, Ind. Ap. 1, 7 Moore, P. C. 35. (2) 5 Ves. 211.

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pledge. *Wilson* v. *Moore* (1) does not assist in the construction of this power, nor does *Attwood* v. *Munnings* (2). The words there were 'indorse, negotiate, and discount,' and all that was decided was that those words did not authorize accepting a bill. The real question here is, whether the word 'negotiate' necessarily requires the discounting of a bill, or whether the word is satisfied by a pledge as in this case.

"It appears to me that the word 'negotiate' is sufficiently wide to cover a transaction such as that which took place in this case.

"We are speaking of a class of documents long known as negotiable instruments, and I think the word 'negotiate' used of such an instrument means to deal with as a negotiable instrument, by indorsement, if the instrument is such as to require indorsement, by delivery, if it passes by delivery; and in my opinion, that may be by an out and out sale or by pledge. I think, therefore, that the word 'negotiate' covers such a transaction as this."

The High Court (*Garth*, C.J., and *White*, J.) reversed this decision, and the opinions expressed were as follows:—

White, J.: "The Defendant strenuously contends that the transaction was warranted by the power of attorney authorizing the attorneys, amongst other things, to 'negotiate' the Plaintiff's Government paper.

"This word is in the power allied with the words 'make sale, dispose of, assign, and transfer.' Each of these words according to the decision of the Privy Council in the *Bank of Bengal* v. *Fagan* (3) is to be read disjunctively, and the powers conveyed by those words are to be treated as joint and several.

"The power of attorney relates to many other classes of property, besides Government notes and Government paper, the last class of property mentioned being 'securities of any description.' Viewing the words conveying authority in connection with classes of property over which the powers are to operate,

(1) 1 M. & K. 337. (2) 7 B. & C. 278.
(3) 5 Moore, Ind. Ap. 40.

it is difficult to see how the word 'negotiate' is appropriate to anything which is ordinarily done with or to a Government promissory note or piece of Government paper. As was truly said by one of the learned counsel for the Plaintiff, if a banker who had a Government note of his customer deposited with him for safe custody, were to receive a written order from that customer to negotiate the Government note, he would not know how to execute the order, and would probably ask his customer for more definite instructions as how he wished the note to be dealt with. If a similar order was given respecting an ordinary commercial promissory note, the banker would feel no hesitation what to do with the note. He would get it discounted, which means that he would sell the note and put it in circulation, with a right on the part of the purchaser or any subsequent holder to have recourse on the party on whose behalf it was discounted, in case that party's name was on the note and default made in payment of the note at maturity. If his principal's name was not on the note when offered for discount, a banker who held a similar power of attorney to the present one would beyond doubt be authorized to indorse the note in his principal's name for the purpose of discounting the bill.

"Promissory notes of the Government of *India* issued against a loan made by the public to that Government, although in form the same as ordinary commercial promissory notes, and although transferable by indorsement like ordinary commercial notes, differ from them in most other essential particulars. They are not payable at any certain time, or on demand, or at sight. Their payment with the exception of the half-yearly interest is deferred indefinitely at the will of the borrowers who are the makers of the notes; and, as far as I am aware, though I do not think the point has ever been or is likely to become the subject of judicial decision, the holders have no right to come upon previous indorsees for payment of either principal or interest in case Government should make default. A consideration of all these circumstances makes me doubt whether the 'negotiate' ought not to be confined in its application to that class of property which is described in the power of attorney as 'securities of any description,' and to such of them only as are ordinarily said to be negotiated, when they are transferred or put in circulation.

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"Taking the term, however, to be applicable to a Government promissory note, and that such a note stands in the same position as an ordinary commercial note, did the word 'negotiate' confer upon *Thompson* authority to do what he did in the present case in the Plaintiff's name?

"Is it reasonable to suppose, or is it a reasonable interpretation of the word 'negotiate' to hold that the Plaintiff, when he executed the power in *Thompson's* favour, intended to confer upon *Thompson* authority to pledge his credit to an indefinite extent or make him responsible for any money which *Thompson* might choose to borrow, or empower him to use the Government paper in *Nicholls & Co.'s* hands as a security for any loan that *Thompson* might please to contract? I think not. The word 'negotiate,' if applicable to such property as Government paper or Government promissory notes, did not, in my opinion, authorize *Thompson* to do more than put the paper in the market, or to put it in circulation in the ordinary way in which such a transaction takes place in the market, and if necessary for that purpose, to indorse it in the name of the Plaintiff. In the transaction which *Thompson* entered into with the Defendant, it was not put in the market or put in circulation, it was deposited as a security for money borrowed. It was an essential part of the transaction between *Thompson* and the Defendant that the latter should keep the paper out of the market and with himself, ready to be returned to *Thompson* when the loan was paid off, or when he sought to redeem the paper. If the Defendant could avail himself of the paper at all by putting it upon the market, it was only after default had been made in repaying the loan or redeeming the paper.

"The Defendant's next contention is, that if the word 'negotiate' does not by itself authorize the transaction, it does so when coupled with the words lower down in the power of attorney which runs thus: 'And for the purposes aforesaid, to sign for me and in my name and on my behalf, any and every contract, agreement, acceptance, or other document.' These are general words; and if the contention were sound *Thompson* under these words might have entered into any transaction he pleased in the name of the Plaintiff, involving the Plaintiff in any amount of responsibility, provided only he used the Plaintiff's Government paper

for the purpose of raising the money necessary to carry out the transaction; thus he might have bought goods or opened a shop in the Plaintiff's name. The authorities cited at the bar shew that these general words are not to be construed as enlarging the authority of the donee of the power, but are to be confined strictly to the doing of things necessary to be done in performing the acts authorized by the power.

"The Defendant having, in my opinion, failed to shew that the pledge of the Government note was authorized by the power of attorney or by the Plaintiff independently of the power of attorney, it follows that he acquired no title to the note by its delivery to him, although at the time it bore an indorsement in blank in the Plaintiff's name."

Garth, C.J.: "I confess, if the case had depended upon the meaning of the word "negotiate" in the power of attorney, I should have been disposed to take the same view as the learned Judge in the Court below. I see no reason why a Government note should not be "negotiated" like any other promissory note, and if, as was suggested in the argument, the word "negotiate" has any special meaning in *Calcutta*, which would confine its applicability to any particular class of instruments, or to any particular mode of dealing with those instruments, I think evidence to that effect should have been given at the trial.

"It was held by the Privy Council in the case of the *Bank of Bengal* v. *Fagan* (1) that a power to indorse a Government note of this kind, authorized an indorsement of the instrument by way of pledge; and upon the same principle it seems to me that a power to negotiate such a note would authorize its negotiation by way of pledge.

"These notes are negotiated in much the same way as an ordinary promissory note; that is to say, by indorsement and delivery in the first instance, and afterwards by delivery only; and indorsement seems to me to be only one mode of negotiation, the word "negotiate" being the more comprehensive term of the two.

"But this case does not depend, in my opinion, upon the meaning of the word "negotiate," nor of any other word in the power

(1) 5 Moore, Ind Ap 10.

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of attorney. It involves a different and much broader question than that in the case of *Bank of Bengal* v. *Fagan* (1). There the transaction, in respect of which the pledge was made, was perfectly honest and unimpeachable. The borrower of the money effected the loan on his own account; and the only question was, whether he had authority under the power of attorney to indorse by way of pledge the Government notes belonging to his brother. The Privy Council held, that the word "indorse" gave him that power, without reference to the purpose for which the indorsement was made."

The Chief Justice ruled that "the whole transaction was a fraud and nullity from beginning to end."

Rigby, Q.C., and *Rolland*, for the Appellant, contended that the power of attorney in its true construction was wide enough to cover the transaction, that is to authorize the indorsement and transfer in question. If the Appellant had bought the Government paper and paid the money for it, there is no doubt that a good title to it would have passed. But it is contended that because the words are not so wide as they might have been, and because he contracted to be bailee, and not purchaser, therefore he took no title at all. Reference was made to *Bank of Bengal* v. *Macleod* (2), *Bank of Bengal* v. *Fagan* (3). The principle is that the words in this power cover a pledge and do not necessarily point to a sale out and out. The old doctrine before it was interfered with by the Factors Acts, was that an agent to sell could not pledge. Reference was made to *De Bouchout* v. *Goldsmid* (4), *Wilson* v. *Moore* (5). The case for the Appellant is that "negotiate" includes "indorse," and that *Bank of Bengal* v. *Macleod* (2) is decisive. *Ireland* v. *Livingston* (6) decides that if a principal instructs an agent in such a way that the agent fairly and honestly understands authority to be given, he may exercise such authority and the principal is bound. There is nothing here which expressly confines the agent's authority to a ready money purchaser, the reasonable construction is that a power to borrow was included.

(1) 5 Moore, Ind. Ap. 40
(2) 5 Moore, Ind. Ap. 1.
(3) 5 Moore, Ind. Ap. 27.
(4) 5 Ves. 211.
(5) 1 M. & K. 337.
(6) Law Rep. 5 H. L. 395.

The word "sign" is also to be considered. It means that the agent has very wide powers. A power generally to sign any contract or agreement confers a position of trust and confidence, it gives power to decide, and therefore the principal should suffer. There is no limit to the extent to which the agent might pledge the principal's credit on such words as these. He could purchase shares to any amount; and could give a promissory note in the name of his principal. "Negotiate" includes negotiate by way of pledge. So does "dispose of." [LORD BLACKBURN:—But is there an authority for the agent to borrow for himself, to pledge on his own account? SIR BARNES PEACOCK:—Is government paper a negotiable instrument under the statute of Anne? Could the Government or an indorser be sued upon it?] It is like an Exchequer bill in this country under 57 Geo. 3, c. 34. Reference was made to *Wokey* v. *Pole* (1).

Cohen, Q.C., and *Woodroffe*, for the Respondent, contended that the agent had no authority to borrow in the Respondent's name, or to pledge the Government paper in question. The purpose for which the power of attorney was given should be attended to, and the meaning of the expressions used should be subordinated thereto. Taking the whole power into consideration there is no authority to borrow, the authority is to sell and purchase shares; there is no power to pledge the principal's credit. Reference was made to *Taylor* v. *Kymer* (2), *Story* on Agency, sect. 68, 69; *Attwood* v. *Mullings* (3). A power to borrow cannot be presumed, for it was not incidental to the duties which the agent undertook; and in this case the money was not in fact borrowed for the purpose of those duties. Even the power to purchase means a power to purchase for cash: *Story* on Agency, sect. 77. With regard to the negotiability of this paper it is not a promissory note within the meaning of the statute of Anne. The transferee takes no better title than the transferor unless by the law merchant, or unless the instrument is negotiable or comes within *Goodwin* v. *Robarts* (4). The case of *Glyn* v. *Baker* (5)

(1) 4 B. & A. 1.
(2) 3 B. & Ad. 320.
(3) 7 B. & C. 278.
(4) 1 App. Cas. 476.
(5) 13 East, 509.

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distinguishes Exchequer bills by what is on the face of them. Reference was made to *Bank of Bengal* v. *East India Company* (1); *P. & O. Company* v. *The Secretary of State for India* (2); *Nobinchunder Day* v. *Secretary of State for India in Council* (3); *Crouch* v. *Credit Foncier of England* (4).

Rigby, Q.C., replied.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The Respondent in this appeal, *George Alder Watson*, is a Surgeon-Major in Her Majesty's Indian Army, and the Appellant is a merchant at *Calcutta*. On or about the 18th of October, 1878, the Respondent deposited with Messrs. *Nicholls & Co.*, described in the plaint as a firm carrying on business as bankers and financial agents in *Calcutta*, promissory notes of the Government of *India*, amounting to Rs.37,500, for which a receipt was given to him by *Nicholls & Co.*, headed "Safe custody receipt." One of those notes was for Rs.20,000. This note was payable to *Watson*, his executors, administrators, or assigns, or his or their order, and was subsequently exchanged by *Nicholls & Co.* for a similar note, apparently that the interest might be received at *Calcutta* instead of *Peshawar*, where the interest on the former note was payable; but no question arises upon this.

On the 18th of October, 1878, *Watson* executed and gave to *Nicholls & Co.* a power of attorney, in the following terms:—

"Know all men by these presents, that I, *George Alder Watson*, Surgeon-Major, 19th Regiment *Bengal* Lancers, do make, constitute, and appoint *William Nicholls* and *George Augustus Thompson*, of Messrs. *Nicholls & Co.*, financial agents, *Calcutta*, jointly and severally to be my true and lawful attorneys and attorney, for me and in my name, and on my behalf, from time to time to negotiate, make sale, dispose of, assign and transfer, or cause to be procured and assigned and transferred, at their or his discretion, all or any of the Government promissory notes, or

(1) Bignell's Rep. 120.
(2) Bourke's Rep. pt. vii. p. 166.
(3) Ind. Law Rep. 1 Calc. 11.
(4) Law Rep. 8 Q. B. 374.

other Government paper, bank shares, or shares in any public company, and other stocks, funds, and securities of any description whatsoever, now or hereafter standing in my name, or belonging to me, or any part or parts thereof respectively. And also for me, and in my name, and on my behalf, from time to time, at their or his discretion, to contract for, purchase, and accept the transfer into my name of any Government promissory notes or other Government paper, bank shares, or shares in any public company, and other stocks, funds, and securities of any description whatsoever, now or hereafter standing in the name or names of, or belonging to, any other person or persons. And also to receive all interest and dividends due, or to accrue due, on all or any of such stocks, funds, and securities. And for the purposes aforesaid, or any of them, to sign for me and in my name, and on my behalf, any and every contract or agreement, acceptance or other document. And to sign, seal, and deliver for me, and as my act and deed, any and every deed which they or he may think expedient."

This power of attorney, when produced in evidence, had on the back of it a seal of the Public Debt Office, Bank of *Bengal*, shewing that it had been registered there, and the new note had on the back two like seals, with the same register number, shewing that a power of attorney had been registered for the receipt of interest and for sale. *Watson* never gave to *Nicholls & Co.* any authority to deal with the notes except the power of attorney. The note when produced bore two indorsements, "*G. A. Watson*, by his attorney, *G. Aug. Thompson*," "*G. A. Watson*, by his attorney, *G. Aug. Thompson*." The former of these indorsements appeared to apply to a receipt for a half year's interest, which was indorsed on the note.

In December, 1880, a broker named *Goberdhone*, employed by *Nicholls & Co.*, applied to the gomastah of the Appellant for a loan to *Watson* of Rs.19,000 on the pledge of a Government security for Rs.20,000, and subsequently brought the note for Rs.20,000. Being asked by the gomastah under what authority the name of *Watson* was signed by *Thompson*, he said there were two seals on the paper, and from the two seals it appeared that Mr. *Thompson* had authority to draw interest and sell the paper,

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so he had full authority. The gomastah then sent the money by one *Koylash Chunder Roy* to the office of *Nicholls & Co.*, telling him to inquire whether the paper was actually signed by *Thompson*. What then took place is stated by *Koylash Chunder Roy* thus:—"In the office the broker took the paper from Ameer *Singh's* durwan, and gave it to Mr. *Thompson*. Mr. *Thompson* gave that paper to me, and said he wanted money on that paper. I asked him if the signature on the paper was his signature, and if he had pledged the paper with Ameer *Singh Shumar Mull*. He said, 'Yes.' I told him 'The paper stands in the name of Mr. *Watson*, why do you want money on this paper, and what authority have you to sign for Mr. *Watson*?' Mr. *Thompson* said, 'I have got a power of attorney. If you wish to see the power of attorney I can show it to you.' He said he had a power of attorney from *Watson* to manage all his business, and he had authority to receive money on that paper. Then he executed a promissory note, in which he signed for Mr. *Watson*, gave the promissory note to me with the Government promissory note, and took the money from me." In the account books of the Appellant the transaction was entered as a payment of Rs.19,000, on account of pledge of company's paper. *Nicholls & Co.* having failed, the Respondent brought a suit in the High Court of *Calcutta*, praying that the Appellant might be decreed to indorse and deliver up the promissory note for Rs.20,000 to him, and to pay him all such interest as the Appellant might have received thereon, and that the Appellant might, if necessary, be restrained from parting with it.

The Judge before whom the case came on for disposal dismissed the suit, with costs. On appeal to the High Court in its appellate jurisdiction, this decision was reversed, and a decree was made in the Respondent's favour, from which there is this appeal to Her Majesty in Council.

It was properly admitted by the learned Counsel for the Appellant in the argument before their Lordships that the Appellant, having notice that the indorsement was under a power of attorney, was in the same position as if the power of attorney had been perused, and if that power did not authorize the indorsement he must fail. But the Counsel contended that it gave an authority

to pledge the Government note, and relied upon the case of the *Bank of Bengal* v. *Macleod* (1). It is necessary to look at the facts, and argument, and judgment in this case somewhat minutely.

The action was one of detinue and debt brought by *James William Macleod* against the Bank of *Bengal* In 1841 the Plaintiff sent from *England* a power of attorney, constituting and appointing *Alexander Donald Macleod* (his brother), and *Christopher Fagan*, carrying on business in *Calcutta* as agents under the firm of *Macleod, Fagan & Co.*, his attorneys, jointly and separately in their individual names, or the name of the firm, and on his behalf, "to sell, indorse, and assign, or to receive payment of the principal, according to the course of the Treasury, of all or any of the securities of the *East India Company* for shares in their public loans," to which he was entitled. *A. D. Macleod* applied to the Bank of *Bengal* for a loan upon his own account, and offered as a security company's paper, No. 13,397, for Rs.5000. This note bore the following indorsement:—"Pay to *G. J. Gordon*, Esq., Secretary, *Union Bank*, or order *J. W. Macleod*, by his attorney, *A. D. Macleod*." "Pay to *A. D. Macleod*, attorney to *J. W. Macleod*, order, *G. J. Gordon*, Secretary, *Union Bank*. *J. W. Macleod*, by his attorney, *A. D. Macleod*." The secretary of the bank, upon inspection of the note and the last indorsement, requested to see the power of attorney, which was shewn to him. The bank then took a further indorsement on the note from *A. D. Macleod* in these words:—"Pay to the Bank of *Bengal*, or order *A. D. Macleod*," and the required loan was then made by the bank in the ordinary course of business. Two days afterwards a further loan of Rs.17,100 was made by the bank to *A. D. Macleod*, upon his depositing two other notes and indorsing them, and his statement that they were his own property.

A verdict was found for the Plaintiff, and a rule which was granted to shew cause why that should not be set aside and a nonsuit entered, or why a verdict should not be entered for the Defendants, or a new trial granted, having been discharged, the Defendants appealed to Her Majesty in Council. The difference between this case and that before their Lordships may be here

(1) 5 Moore, Ind. Ap. 1; 7 Moore, P. C. 35.

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noticed. The power of attorney contained the word "indorse." The loan was made to *A. D. Macleod* on his own account, and the bank took an indorsement on the note from him on his own account, and not as attorney for *J. W. Macleod*. In this case, and in the similar case of the *Bank of Bengal* v. *Fagan* (1) (the judgment being given in both cases), it was argued for the Appellants that *A. D. Macleod* had power to indorse the notes; that "sell, indorse, and assign" might be read either distributively or conjunctively, and the power to indorse was not auxiliary only but was the real object of the power. For the Respondent it was argued that the indorsement mentioned in the power of attorney was for the purpose of authorizing *A. D. Macleod* as agent for the purposes of a sale, and a power to sell did not give a power to pledge, that the word "indorse" was controlled by the context, and the words must be taken collectively. The following passages (p. 38) from the judgment delivered by Lord *Brougham* shew the ground of the decision:—

"Thus, the main and fundamental question is, had *Macleod & Co.* authority to indorse under the power of attorney, which is in the same words in both cases. It is to 'sell, indorse, and assign, or to receive payment of the principal according to the course of the Treasury, and to receive the consideration money and give a receipt for the same.' It is contended for the Respondent that the words 'sell, indorse, and assign,' used conjunctively cannot be used in the disjunctive, but that the only power given to indorse is one ancillary to sale, and that we are to read it as if it were, power to sell, and for the purpose of selling to indorse. This construction is endeavoured to be supported by referring to the variation of 'or' for 'and' immediately following 'or to receive the money at the Treasury.' We are unable to go along with this view of the instrument. The variation is clearly owing to a new subject-matter being introduced. . . . Shall we then say that a power to 'sell, indorse, and assign,' does not mean a power to sell, a power to indorse, and a power to assign; and would not such a negative or exclusion be doing violence to the plain sense of the words? If we adopt this exclusive construction we must

(1) 5 Moo. Ind. Ap. 40.

hold that these words not only give no powers to indorse without selling, but also that they give no power to sell without indorsing, and we must suppose an agent acting under such a power to be entirely crippled. . . . It appears to us that the rational and the natural construction is the one which represents a power to 'sell, indorse, and assign,' as a power to sell, a power to indorse, and a power to assign—so that these acts may be done apart or together, and that the powers are conveyed conjointly and severally."

It seems to have been thought by two of the learned Judges of the High Court that it was laid down in this case, as a rule of construction, that words used in a power of attorney to express the objects of the power are always to be construed disjunctively. Their Lordships cannot agree in this view of the case. The words there may have been used disjunctively, but they do not see any reason why the rule laid down by Lord *Bacon, Copulatio verborum indicat acceptationem in eodem sensu*, which is intended to aid in arriving at the meaning of the parties, should not be used in construing a power of attorney as much as any other instrument.

The power of attorney in the present case is not in the same form as that in the *Bank of Bengal* v. *Macleod* (1). It does not contain in express words a power to "indorse." If it had, the question would have been whether there was anything to prevent it from being a power in the discretion of the donee of it to indorse the note and so convert it into one payable to bearer whenever he thought fit to do so for any purpose. But in this power the indorsement is not authorized in express words, but is authorized if it comes within the meaning of the words, "And for the purposes aforesaid to sign for me, and in my name and on my behalf, any and every contract or agreement, acceptance, or other document." The "purposes aforesaid" are these,—

"From time to time to negotiate, make sale, dispose of, assign, and transfer, or cause to be procured and assigned and transferred [there seems to be a mistake in words here, but it does not make any difference in the meaning], at their or his discretion, all or any of the government promissory notes or other government

(1) 5 Moore, Ind. Ap. 1; 7 Moore, P. C. 35.

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paper, &c., and also for me, and in my name, and on my behalf, from time to time, at their or his discretion, to contract for, purchase, and accept the transfer into my name of any government promissory notes or other government paper, &c."

The Appellant's counsel relied mainly upon the word "negotiate," and also upon "dispose of." In order to see what was intended by these words, they must be looked at in connection with the context, as well as with the general object of the power. This appears to their Lordships to have been to sell or purchase for *Watson* government promissory notes and other securities, not to borrow or lend money upon them. If the word "negotiate" had stood alone, its meaning might have been doubtful, though, when applied to a bill of exchange or ordinary promissory note, it would probably be generally understood to mean to sell or discount, and not to pledge it. Here it does not stand alone, and, looking at the words with which it is coupled, their Lordships are of opinion that it cannot have the effect which the Appellant gives to it, and, for the same reason, "dispose of" cannot have that effect.

It did not appear when the indorsement by *Thompson* as *Watson's* attorney was made, but *Nicholls & Co.* did not deal with the note as having themselves become the holders of it by indorsement, as was the case in the *Bank of Bengal* v. *Macleod* (1). They borrowed the money on behalf of *Watson*, giving a promissory note for it signed by *Thompson* as his attorney, and pledged the government promissory note as *Watson's*. As they had not authority to do this, the authority to sell not giving an authority to pledge, the Appellant acquired no title to the note by its delivery to him, and the High Court has properly made a decree in the Plaintiff's favour.

Their Lordships will humbly advise Her Majesty to affirm that decree and to dismiss this appeal, and the costs of it will be paid by the Appellant.

Solicitors for Appellant: *Watkins & Lattey.*
Solicitors for Respondents: *Vallance & Vallance.*

(1) 5 Moore, Ind. Ap. 1; 7 Moore, P. C. 35.

MOUNG HMOON HTAW . . . . . DEFENDANT;

AND

MAH HPWAH . . . . . PLAINTIFF.

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1883
Nov. 28
1884
Feb. 9.

ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.

Burmah Courts' Act, 1875, *s.* 4—*Buddhist Law of Marriage—Wife's Claim to Maintenance.*

In a suit by a wife against her husband to recover the expenses of necessaries and living for the past five years:—

Held, that the parties being Buddhists, the case must under the *Burmah Courts Act*, 1875, sect. 4, be decided according to the Buddhist law; and that by that law the wife having maintained herself out of her separate property cannot sue for maintenance for the period during which she has done so:—

Held, also, that even if the rule of justice, equity, and good conscience applied, the Plaintiff had not established any ground for making the Defendant liable for her maintenance.

APPEAL from a decree of the Recorder of *Rangoon* (June 21, 1881), on the hearing of a suit by a wife against her husband for maintenance, whereby the latter, the Appellant, was ordered to pay to the former Rs.10,000 and costs.

The facts are stated in the judgment of their Lordships, and the questions raised in the appeal related to the *status* and incidents of marriage amongst Burmese Buddhists.

The material passages in the Recorder's judgment are as follows:—

"Having found as a fact that the Plaintiff is the wife of the Defendant by a validly constituted marriage, then comes the question whether she is entitled to maintenance.

"There are many passages in the Manoo Wonnanna and Manoo Thara Shwe Myeen Dammathâts, both recognised as of high authority, which shew that a husband is bound to maintain his wife; and in the Manoo Kyay Dammathât translated by the late

* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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Dr. *Richardson*, which is the Dammathât hitherto most generally used as a guide in questions of Burmese law, probably from the fact of its being the only one translated into English, in the chapter on the different kinds of wives, par. 14, page 14, the liability is clearly indicated. There it is laid down in the case of a husband going on a trading trip leaving a sufficiency for his wife's subsistence, that should she marry before the expiration of eight years he may take away all her property and sell her and if there be debts she must bear them all. But if the husband does not leave subsistence for his wife and shall be absent eight years trading, and she has not enough for her necessary food and clothing, and publicly incur debts for her subsistence, when her husband arrives he must pay them and cannot say that they were contracted without his knowledge. Whether or not only one wife is permissible according to the older Dammathâts, on page 93 of Manoo Kyay Dammathât, which at any rate is an old work, in sect. 46, Book III., it gives the law when debts are incurred by a head wife, a lesser wife, or the six kinds of concubines. When a head wife incurs the debt for necessary expenses even without the husband's knowledge and the creditor has informed him of it during her lifetime, and she dies, he has to pay it with cent. per cent. interest. If it be incurred by a lesser wife he has to pay principal with 50 per cent. interest, and if by a concubine who has not been purchased or connected by means of money but who did not eat out of the same dish with him, then he has to pay the principal with 25 per cent. interest. In the Manoo Wonnanna, page 112, sect. 116, referring to the husband going to a distant country and expecting to remain there, it says he must provide subsistence before he leaves.

"Having found that the Plaintiff is the wife of the Defendant, although by mutual consent and for his convenience in trade she lived in *Rangoon*, whilst his residence was at *Moulmein*, his position is somewhat analogous to that of the husband who goes for the purpose of trading into a distant or foreign land, and is bound to supply his wife with subsistence according to his means and position. I see no reason why because a woman happens to be a second wife, his liability to maintain her should not also attach as in the case of a first wife. The Defendant said the Plaintiff

was only a concubine, and he paraded his vices and dissolute habits to the Court to shew that she was in no better position than the many other women he had picked up at different places in his journeys. But I have found that she is his wife, and Burmese law clearly recognises that a husband is bound to support his wife, and there is nothing to shew that it makes any difference in the case of a second wife, and I therefore am of opinion that the Plaintiff is entitled to maintenance suitable to her position as such, having reference to his means and ability to pay. It has been urged, however, that if she is, she cannot maintain a suit for it, as it is not a matter of a civil nature cognizable by this Court. But upon the authority of the High Court, Full Bench Case, *Aunjona Dasi* v. *Prahlad Chandra Ghose* (1), I hold that this is a suit cognizable by the Court, as I recently held on the same authority that I could entertain a suit wherein the parties were Mahomedans, to restrain a person marrying a Mahomedan female against the wish of her alleged guardians. Maintenance when it is in arrear is a debt which is essentially a matter cognizable by a Civil Court so long as it is not barred by limitation.

"Then for what period and at what rate is the Plaintiff entitled to recover? Her demand is I consider a moderate one for the period for which she sues, considering the style in which she lived on her own means, and her husband's large and lucrative business. Her expenses she says were always over Rs.300 a month whilst she has only laid her claim at the rate of Rs.198 a month. That is a very reasonable rate. Now from what period is she entitled to be paid this? During the first three years of the marriage the Plaintiff does not appear to have looked to the Defendant for support. She was a woman of some fortune, otherwise she could not have expended Rs.300 a month on herself, and she did not seek for any stated allowance from her husband, being, it may be, content to share with him the position that his large and prodigal expenditure on works of merit gave him in the estimation of the public. Undoubtedly he spent large sums in this way, and the putting up the "Htee" on the pagoda at such a cost made him at the time a man of great note. This he

(1) 6 Beng. L R 243.

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did, after the manner of Burmans, after a very prosperous and successful season in his teak forests, and probably it may to some extent have been induced from the desire to lay up a store of merit to serve him in a future state of existence in counteracting the de-merits he must be conscious of having accumulated in his present life by indulging his carnal appetites to the extent he boasts he has done. The Plaintiff too, says she out of her own fortune advanced considerable sums on his account to obtain merit, and that she has now little left. Be that as it may, for three years she chose to live on her own means. Can she therefore sue for maintenance for any part of that period. Can she say, although she was willing to spend her own when he ought to have provided her with means, whilst he treated her as a wife and lived with her as often as the exigencies of his business permitted him to come to *Rangoon*, now that all that is altered, and he has deserted her, keeping her at arm's length, that she is entitled to claim maintenance for as long a time as he had not provided her with any, provided it is not beyond the limits she can sue for maintenance. At first I was inclined to the opinion that having tacitly spent her own money in keeping herself, and there being nothing in the Dammathâts which have been referred to to shew that a wife who has means should not expend them on herself, and so prevent the husband incurring liability for debts contracted with strangers, but on further consideration it seems to me unjust that, merely because a wife has tacitly lived at her own expense under a particular set of circumstances, she should, as it were, be taken thereby to have contracted herself out of her rights and be unable to recover them when those circumstances have become changed, and that through the fault of the husband. All that she can be said to have done, it seems to me, is that she, like many other creditors, was not vigilant to exact her debt at the risk of its becoming barred by limitation. Whatever period therefore is within the terms of limitation applicable to the case, I hold she can recover, and also for the period during which he has ceased to live with her, that is from 1239 B. E., for I do not consider what took place on either occasion at *Oo Hpaw Gyee's* house amounted in any respect to a divorce, or that the Defendant having ceased to live with the Plaintiff, in itself constitutes

a divorce according to Burmese law. Although a divorce was talked about at *Oo Hpaw Gyee's* house, and the Plaintiff went there in order to arrange for its being brought about, still nothing was done, both parties got angry and *Oo Hpaw Gyee* says he nearly turned them out of his house. Things went on for another year in the same way as before, when the Plaintiff again demanded a divorce and repayment of the sums of money she had, she says, spent on his behalf, and also for maintenance. This was the first time she seems to have asked him for maintenance. No divorce was given on this occasion either, and notwithstanding that the Defendant may have considered that he had virtually divorced her by ceasing to cohabit with her, I hold they are still man and wife. Though either party may divorce the other from mere caprice, even though there is no fault on such other's part, divorces are seldom made except at the instance of the Loogyees before whom the parties consent to go, who then pronounce the divorce; or the parties sue in the Civil Court for a divorce, and until it is formally pronounced the marriage subsists.

"Being of opinion that the parties were duly married, which marriage has not been dissolved by a decree of divorce, also being of opinion that the Plaintiff is entitled to maintenance, and is not estopped from claiming for the period during which she lived at her own cost, provided it is not barred by the law of limitation, I have to say what period of limitation applies to her case. No express period is given in the *Limitation Act* where the suit is brought by a Buddhist. The only class for whom an express period is enacted are Hindus, and they can sue within twelve years. As regards all other races or nationalities the Act is silent; but it is enacted that in all other cases not specially mentioned the term shall be six years. This then is, it seems to me, the period applicable to the Plaintiff, but she can recover no more than she has sued for. She has assessed her claim at about Rs.198 a month for five years after giving credit for Rs.1400, the amount realized on the sale of a house which the Defendant gave her, and there will be a decree accordingly for the amount claimed, viz., Rs.10,000 and costs."

Woodroffe, for the Appellant, contended that the Respondent

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had not established any legal right to the decree under appeal. Assuming the Appellant and Respondent to have been married according to Buddhist usage, two broad questions arise, first, whether such marriage had not under that usage been dissolved by the non-cohabitation of the parties for upwards of three years, coupled with the Appellant's refusal to recognise the Respondent as his wife, and her expressed desire to be divorced from him; second, whether the marriage relation still subsisting, the Respondent is entitled to maintenance as claimed by her. The parties are Buddhists, and by the law applicable to them may be divorced without any decree or order of Court: *Mee Hueen Gnoang* v. *Nga Oung* (1); not only by mutual consent which may be expressed or implied, *Mee Thet Stang* v. *Nga Isau Door* (2), but also on certain terms as to distribution of property at the will of either of the spouses: *Spark's* Burmese Code, c. 3: *Sheway Yin* v. *Mee Thoo Gneh* (3).

[SIR BARNES PEACOCK:—The Appellant did not plead a divorce in the Lower Court. His written statement denies that he had ever married the Respondent.]

The question whether the conduct of the parties operated as a divorce according to Buddhist law appears from the judgment under appeal to have been discussed before the Recorder.

[LORD FITZGERALD:—There was no issue as to divorce. In their Lordships' judgment this question cannot now be argued.]

With regard then to maintenance, it is submitted that it is in the present case "a question regarding marriage" within Act XVII. of 1875, sect 4. And as the proposition advanced by one of the *Bombay* Judges in *Ardaseer Cursetjee* v. *Perozeboye* (4), that marriage, whatever be its form, operates *per se* as a contract entitling the wife to maintain a civil action for maintenance against her husband, was not assented to by the committee, and is in fact without authority: it is necessary to ascertain whether marriage according to Buddhist law creates such liability, and if so, under what circumstances and to what extent. Marriage as understood among Buddhists in *British Burmah*, is

(1) 3 Jardine's Notes on Bhuddist Law, App. B. p. 1.
(2) Select Decisions, Burmah, p. 3.
(3) 4 Jardine's Notes on Bhuddist Law, pt. 5, p. 3.
(4) 6 Moore, Ind. Ap. 348.

merely a civil contract for cohabitation on the footing of social equality, implied or evidenced by the act of eating together out of the same dish, involving the subordination of the wife to the husband and the mutual performance of certain conjugal duties: see Manoo Kyay Dammathât, Book III., sect. 1, sects. 30–33 in *Richardson's* edition (1874), p. 336, and pp. 347, 348; Manoo Tsaya Dammathât, sect. 59 in 3 *Jardine's* Notes on Buddhist Law, App. A., p. 10; *Moung Ko* v. *Mee Shewaz Ya* (1); Wagaru Dammathât, Part II., sect. 1 in 4 *Jardine's* Notes on Buddhist Law, Part III., p. 3. The husband and wife do not become in law one person. Nor does either spouse acquire any interest in the separate property of the other, whether originally belonging to such other or acquired by him or her after marriage. They are, however, equally entitled to the joint property of both consisting of the profits arising from the employment of the separate property of either, as also of all property acquired during marriage by their mutual skill and industry: see *Spark's* Burmese Code, c. 1, sect. 14; 1 *Jardine's* Notes, Part II.; Select Burmese Decisions, p. 17, per *Jardine*, J.; Manoo Kyay Damathât, Book XII., sect. 3 in *Richardson's* Edition (1874), pp. 342–4. The Respondent was at best a lesser wife, that is a woman whom a man takes as wife whilst the maiden (ngohmaya), whom he being a bachelor (ngehlin) married, is alive and not divorced: *Mah Shwag Choe* v. *Moung Oung Gyee* (2). She had abundant means of her own, irrespective of the large sums received by her from the Appellant, and out of the profits arising from the employment of her separate property in the various trades carried on by her after marriage, could and did maintain herself according to her own evidence in the same style after marriage as she had done before. If then the Appellant was bound to maintain the Respondent, he has in fact done so by permitting her the free use of those profits to which as the joint property of both he as well as she was entitled. There is, however, by Buddhist law, no obligation in the husband to maintain his wife, which she can enforce by civil suit. No authority in any Dammathât has been shewn to the effect that

(1) Sandford's Rulings, p. 15. (2) 4 Jardine's Notes, pt. v. p. 5.

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a wife may demand maintenance from her husband while the marriage still exists: *Nga Kan Ya* v. *Mee Alay* in Select Burmese Decisions. Nor, it might have been added, inasmuch as the rights and obligations of Buddhist spouses (saving a certain subordination of the wife to the husband) are absolutely correlative, can the husband similarly compel the wife to support him. That law provides that a husband or wife, at all events, if ngehlin or ngehmaya, who being possessed of sufficient means, neglects to maintain his or her diseased or disabled spouse if in want, may for such neglect be punished criminally and compelled to give suitable support as under the poor laws in this country: Manoo Kyay Dammathât, Book V., sect. 18 in *Richardson's* Edition (1874), p. 142. This, however, is matter of criminal and not civil cognizance, and is now dealt with so far as the wife is concerned by the Code of Criminal Procedure. The passages from the various Dammathâts to which the Recorder refers as establishing the liability of a husband to maintain his wife do not support his conclusion. They relate either to the power which a man and his wife, or even a man and his concubine mutually have of pledging each other's credit; or to the disability to which the husband subjects himself who absents himself from his wife without leaving her sufficient means of support, in the event of her surrending herself to another during his absence, not to the obligation of maintenance considered either as matter of civil or criminal cognizance. They resolve themselves on the one hand into enumeration and illustration of the doctrine of agency, on the other into limitations of certain of the husband's rights: see Manoo Kyay Dammathât, Book III., sects. 28–32 and 46–48; Book V., sects. 14-17, in *Richardson*, pp. 82, 84, 93, 94; and Manoo Wonnanna Dammathât, sects. 167–8 in 3 *Jardine's* Notes, p. 27; and *Sandford's* Rulings, p. 26. Should the passages, however, be thought relevant in any degree to the question of maintenance, the present case does not fall within them. They apply only to the wife "wholly without subsistence" when "she really has not enough for necessary food and clothes, and publicly incurs debts for her subsistence," or "not having

wherewithal to buy food or clothes," sells or pledges herself or her children to obtain necessary support. Here the Respondent according to her own statement in consequence of her business requirements, lived in her own house at *Rangoon* apart from the Appellant, and having ample means maintained herself thereout as she chose without reference to him.

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

The Appellant was the Defendant in an action brought by the Respondent in the Court of the Recorder of *Rangoon*, in which the Respondent alleged that she was married in *Rangoon* to the Appellant according to Burmese rights and customs, and claimed Rs.10,000 for her expenses of necessaries and living for five years, deducting Rs.1400, the amount realized by the sale of a house given to her by the Appellant. The Appellant denied the marriage and that the Respondent was entitled to any maintenance. The Recorder found as a fact that she was the wife of the Defendant by a validly constituted marriage, the Burmese law recognising a plurality of wives, and the Plaintiff being what is generally called a lesser wife. Their Lordships are of opinion that this was quite in accordance with the evidence. He then considered the question of maintenance, as to which the material facts may be taken from the evidence which the Planitiff herself gave.

They were married in *Tagoo* 1235 (about 1873 A.D.). The Defendant is a trader in timber and a forester, and has forest leases in *Zimmay*, the *Mine-loon-gyee* forest. The Plaintiff carried on a business of her own at *Rangoon*. At the marriage the Defendant gave her a dower of Rs.20,000, and they lived together for some time, principally at *Rangoon*, but the Defendant's business frequently took him away. He wished her to reside at *Rangoon*, and requested her to live in a respectable style, which she did, entertaining the relatives and friends of the Defendant, and he not giving her any money towards the expenses of those

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entertainments. The Plaintiff always carried on a business of her own, dealing in mineral oil and rice, and accumulated Rs.80,000 in different kinds of property; and lived, she said, in the same style after marrying the Defendant as she had done before. In the opinion of the Recorder the Plaintiff received from the Defendant about Rs.23,500, but she said she had expended all that and large sums of her own in works of merit for the Defendant at his request.

Upon the question of maintenance, the Recorder said, "There are many passages in the Manoo Wonnanna and Manoo Thara Shwe Myeen Dammathâts, both recognised as of high authority, which shew that a husband is bound to maintain his wife; and in the Manoo Kyay Dammathât, translated by the late Dr. *Richardson*, which is the Dammathât hitherto most generally used as a guide in questions of Burmese law, probably from the fact of it being the only one translated into English, in the chapter on the different kind of wives, par. 14, p. 14, the liability is clearly indicated." Then after stating what was there laid down, he said he was of opinion that the Plaintiff was entitled to maintenance suitable to her position as second wife, having reference to the Defendant's means and ability to pay. The judgment, from which it is unnecessary to quote more, ended by saying that the Plaintiff was not estopped from claiming for the period during which she lived at her own cost, provided it was not barred by the law of limitation, and giving the Plaintiff a decree for the amount claimed, viz., Rs.10,000, and costs.

Since this judgment was given, Mr. *Jardine*, the present Judicial Commissioner of *British Burmah*, has published some valuable notes on Buddhist law, with translations of the Wonnanna Dammathât, and several others, on marriage and divorce, and inheritance and partition, with notes, and cases illustrating the Burmese law of marriage and divorce, as now administered in the British Courts. In coming to an opinion upon this appeal, their Lordships have had the advantage of this additional information about Burmese law.

For the purposes of marriage, divorce, and inheritance, the property of the married persons is considered separate or joint.

The following is defined as separate property of the husband and wife by Major *Sparks* in his Code, which has been used in the British Courts as an authority on Burmese law :—

1. What belonged to either before marriage.

2. What has been given especially to either since marriage.

3. What has come into the possession of either by inheritance from his or her own family since marriage.

4. Clothes, jewels, and ornaments.

The profits or interest arising since marriage from the employment or investment of the separate property of either husband or wife, as also the property required during the coverture by their mutual skill and industry, are their joint property.

It is the duty of the husband to provide subsistence for his wife, and to furnish her with suitable clothes and ornaments. If he fails to do so he is liable to pay debts contracted by her for necessaries; but it appears to their Lordships that this law would not be applicable where she has sufficient means of her own. They have not found any authority for saying that where the wife has maintained herself she can sue her husband for maintenance for the period during which she has done so.

By the *Burmah Courts Act*, 1875, sect. 4, it is enacted that where in any suit or proceeding it is necessary for any Court under that Act to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution, the Buddhist law, in cases where the parties are Bhuddhists, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished, or is opposed to any custom having the force of law in *British Burmah*. And in cases not provided for by the former part of the section, or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience. It appears to their Lordships that this is a question regarding marriage, and is to be decided according to the Bhuddist law; but assuming that it is a case in which the Court is to act according to justice, equity, and good conscience, their Lordships have considered whether the decree appealed from can be supported on those grounds. The Recorder seems to have taken this view of the

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case, for he says, "It seems to me unjust that merely because a wife had tacitly lived at her own expense under a particular set of circumstances, she should, as it were, be taken thereby to have contracted herself out of her rights, and be unable to recover them when those circumstances have become changed, and that through the fault of the husband." Their Lordships do not agree to this. Having regard to the Burmese law as to the property of married persons, they do not see in the facts of this case any ground in equity or good conscience for making the Defendant liable for maintenance. It may be that he requested the Plaintiff to live in a respectable manner, but she incurred no additional expenses in consequence. It did not cause any change in her style of living, and it is not possible to assign any portion of her claim to that request.

It remains to be noticed that in the reasons for the appeal it is said that there had been a divorce according to Buddhist law by the conduct of the parties. This was not made a ground of defence in the Defendant's written statement, and there was no issue upon it. And consequently their Lordships intimated to the counsel for the Appellant that they could not allow this question to be argued.

For the reasons above given their Lordships will humbly advise Her Majesty to reverse the decree of the Recorder's Court, and to order the suit to be dismissed with costs in that Court. The costs of the appeal to be paid by the Respondent.

Solicitors for Appellant: *Sanderson & Holland.*

HAJI ABDUL RAZZAK . . . . . DEFENDANT; J. C.*

AND 1884

MUNSHI AMIR HAIDAR . . . . . PLAINTIFF. March 13, 14.

ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.

Act I of 1869, *s.* 13—*Validity of Will—Registration—Title to Maintenance—Deposit of Will.*

Held, that a sister's son is not a person a bequest to whom in the lifetime of a brother is excepted from the necessity of registration under sect. 13 of Act I. of 1869.

Quære, whether a person entitled to maintenance has such an interest in the deceased's estate as would except a bequest in his favour from the like necessity.

A deposit of a will under Part IX. of Act VIII. of 1871 is not a registration as required by Act I of 1869.

APPEAL from a decree of the Judicial Commissioner (March 22, 1882), whereby he modified in favour of the Respondent a decree of the District Judge of *Lucknow* (Sept. 2, 1881). and decreed to the Respondent the real property left by *Mussumat Kutub-un-nissa*, deceased, talukdar of *Gauria*, together with mesne profits from the date of suit, and dismissed the rest of the Respondent's claim.

The main question in the suit, and that on which the Courts below differed, was as to the validity, in the absence of registration under the provisions of the *Oudh Estates Act*, 1869, and the *Indian Registration Act*, 1871, of the will of one *Mussumat Kutub-un-nissa*, a Mahomedan lady and an *Oudh* talukdar, whose name had been entered, as such, in the lists Nos. 1 and 3 of talukdars, drawn up in accordance with Part III of the *Oudh Estates Act*, 1869.

The facts are stated in the judgment of their Lordships.

The finding of the Judicial Commissioner as to registration was as follows:—

"As regards registration, it is explained in sect. 2, Act I. of

* *Present:*—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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1869, that 'registered' means registered according to the provisions of the rules relating to the registration of assurances for the time being in force in *Oudh*. The will of *Mussumat Kutub-un-nissa* was simply deposited under the provisions of Part IX., Act VIII. of 1871. The special rules for the deposit of wills were not the rules relating to the registration of assurances. To have made the registration valid there should have been registration under Part VIII. of the Act. I must find against the Defendant-Respondent that the will was not registered as required by Act I. of 1869."

Sykes, and *Duthie*, for the Appellant.

Doyne, for the Respondent, was not called upon.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

In this case *Mussumat Kutub-un-nissa* was the talukdar of an estate called *Gauria*, under a sunnud granted to her by the Government of *India*. She died in 1879, having made a will on the 30th of April, 1874. The present suit is brought by her heir-at-law, her brother, who claims what he is entitled to of her estate as heir. The Defendant is a nephew of hers, a sister's son; and he sets up the will, under the provisions of which he was entitled to the taluka and the greater part of her property. The Plaintiff denied the execution of the will; he imputed fraud, he denied the capacity of the testatrix, and in other ways impugned the will. It is not necessary to dwell upon these issues, which both Courts have found against him, and which have not been argued again by his counsel here. A further question was raised which certainly had been alluded to, if not mentioned as distinctly as it might have been in the plaint, that the will had not been properly registered under the *Oudh Talukdars Act*. The subordinate Judge declined to entertain this question, because it was raised at a late stage when apparently the evidence had been finished, and because on the settlement of issues it had not been suggested on either side that an issue should be raised on this point; and he found the will to be established. Thereupon an

appeal was brought by the Plaintiff to the Judicial Commissioner. The Judicial Commissioner agreed with the subordinate Judge as to the factum and validity of the will, except so far as it was not registered; but he came to the conclusion that it had not been properly registered under the provisions of sect. 13 of the *Oudh Talukdars Act.* That is the question before their Lordships. Many other questions were raised in the ingenious argument of Mr. *Sykes;* but inasmuch as the greater part of them have been disposed of in the course of the argument, their Lordships do not think it necessary further to advert to them.

The 13th section is to this effect:—"No talukdar or grantee shall have power to give or bequeath his estate or any portion thereof, or any interest therein, to any person not being either (1) a person who under the provisions of this Act, or under the ordinary law to which persons of the donor's or testator's tribe and religion are subject, would have succeeded to such estate or to a portion thereof, or to an interest therein, if such talukdar or grantee had died intestate." Sub-sect. 2 follows, which is not material to the present case, and then come the words:—"Except by an instrument of gift or a will executed and attested, not less than three months before the death of the donor or testator, in manner hereinafter provided in the case of a gift or will, as the case may be, and registered within one month from the date of its execution." There is an interpretation clause, which says "'registered' means registered according to the provisions of the rules relating to the registration of assurances for the time being in force in *Oudh.*" The two questions, then, which arise are these: In the first place, was it necessary that this will should be registered? In the second place, was it registered?

The first question depends upon whether the devisee came under the description of persons in the 1st sub-section of clause 13—"a person who under the provisions of this Act, or under the ordinary law, would have succeeded to such estate or to a portion thereof, or to an interest therein, if such talukdar or grantee had died intestate." The only plausible argument adduced on the part of the Appellant on this sub-section was that the Appellant would have been entitled to maintenance, which, if not an "estate or a portion thereof," was "an interest

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therein," and therefore that a devise to him need not be registered. Their Lordships are far from affirming that a mere title to maintenance would be such an "interest therein" as would come within this clause; but it is not necessary to decide this question, because the section which, if at all, confers this right to maintenance—sect. 26,—(taken in conjunction with sect. 24), speaks of "nephews of the deceased, being fatherless minors," and it is not shewn that this Appellant was a minor either at the time of the death of the testatrix or at the execution of the will. It is scarcely necessary to observe that under sect. 22, which regulates the succession to taluks, his claim cannot be supported. There appears no pretence for speaking of him as an adopted son under the 5th clause; and none of the other clauses have been contended to be applicable to him.

This being so, it follows that the will is one which, in order to be valid so far as to pass the taluk, requires registration; and then we come to the question whether it has been registered in accordance with the Act.

The interpretation clause before referred to leads to the inquiry what were the rules relating to the registration of assurances for the time being in force in *Oudh*. They are to be found in Act VIII. of 1871. It is to be observed with reference to that Act that it contains a very distinct set of provisions with respect to what is called depositing wills and registering them. Section 27 is in these terms:—"A will may at any time be presented for registration,"—that is one thing,—"or deposited in manner hereinafter provided,"—which is another thing. When we proceed with the Act we find that Part VIII. relates to presenting for registration wills, and authorities to adopt. Section 40 is in these terms:—"The testator, or any person claiming as executor or otherwise under a will, may present it to any registrar or sub-registrar for registration." Section 41 runs thus:—"A will or an authority to adopt, presented for registration by the testator or donor, may be registered in the same manner as any other document." Part IX. refers to the deposit of wills, and sect. 42 says:—"Any testator may, either personally or by duly authorized agent, deposit with any registrar the will in a sealed cover superscribed with the name of the depositor and the nature of

the document." Section 43 says:—"On receiving such sealed cover, the registrar, if satisfied that the depositor is the testator or his duly authorized agent, shall transcribe in his register book No. 5 the superscription on such sealed cover, and note in the register and on the sealed cover the year, month, day, and hour of such presentation and receipt, together with the name of the depositor and the name of each of the persons testifying to the identity of such depositor, and the inscription, so far as it is legible, on the seal of the cover. The registrar shall then place and retain the said cover in his fire-proof box." Section 44 says:—"If the depositor of any such sealed cover wishes to withdraw it, he may apply to the registrar with whom it has been so deposited for the delivery of the cover; and the registrar, if satisfied as to the identity of the depositor with the applicant, shall deliver the cover accordingly." And then, after the death of the testator, there is a provision for its being opened and registered. So it appears that by the deposit of a will no information is given to anybody who may search the register as to its contents, and the testator can at any time during his lifetime withdraw it in the sealed envelope in which it was deposited; whereas, with respect to the registration, in the ordinary and proper sense of the word, of wills and other documents, there are provisions which would enable persons who searched the register to ascertain the contents of those documents.

It appears, therefore, to their Lordships that the will was not registered in accordance with the provisions of sect. 13 of the *Oudh Talukdars Act*. That being so, they are of opinion that the judgment of the Commissioner was right, that the will had no operation as far as the taluk was concerned; but as far as the personal property was concerned it had an operation, inasmuch as so much of it did not require to be registered; and he gave the Defendant the benefit of its operation in that respect.

Under the circumstances their Lordships will humbly advise Her Majesty that the judgment appealed against should be affirmed. The Appellant must pay the costs of the appeal.

Solicitor for Appellant: *W. Buttle.*

Solicitors for Respondent: *Barrow & Rogers.*

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Feb. 19; March 22.

GOKULDOSS GOPALDOSS . . . . . DEFENDANT;

AND

RAMBUX SEOCHAND (PLAINTIFF) AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF THE RESIDENT AT HYDERABAD, DECCAN.

Prior Incumbrance not extinguished by Payment—First Mortgage paid off with Notice of Second—Rights of Purchaser of Equity of Redemption.

The purchaser of an equity of redemption in reference to immoveable property situated in the *Hyderabad* Assigned Districts, paid off the first mortgage thereon with notice of a second mortgage:—

Held, that he must be assumed, according to the rule of justice, equity, and good conscience there applicable, to have intended to keep the first mortgage alive, and that therefore he was entitled to stand in the place of the first mortgagee and to retain possession against the second mortgagee until repayment.

The doctrine laid down in *Toulmin* v. *Steere* (3 Mer. 210), that the purchaser of an equity of redemption cannot set up a mortgage which he has got in against subsequent incumbrances of which he had notice, is not to be regarded as a rule of justice, equity, and good conscience, and therefore cannot be applied to such Indian transactions as are governed by that rule.

APPEAL from an order of the Resident (June 24, 1880), affirming decrees of the Courts of the Judicial Commissioner and Deputy Commissioner of the *Hyderabad* Assigned District, dated respectively the 28th of February, 1880, and the 8th of August, 1879, under which the Appellant had been ordered to give up possession of certain houses to the Respondent above named.

The facts are stated in the judgment of their Lordships.

The disputed questions of fact had been disposed of by the concurrent judgments of the Courts below. The question of law was whether the Appellant, the purchaser of a mortgagor's right, title, and interest in nine houses, having paid off a first mortgagee of three of them, was entitled to stand in his place with regard to those three houses until repayment.

* *Present:*—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

Kekewich, Q.C., and *Hornell*, for the Appellant, contended that he was so entitled. They referred to *Greswold* v. *Marsham* (1); *Toulmin* v. *Steere* (2); *Dart's* Vendors and Purchasers, 5th ed. vol. ii., p. 917; *Mocatta* v. *Murgatroyd* (3); *Parry* v. *Wright* (4); *Adams* v. *Angell* (5); *Stephens* v. *Mid Hants Railway Company* (6); *Otter* v. *Lord Vane* (7); *Goluknath Misser* v. *Lalla Prem Lal* (8); [*Mayne* referred to *Mohesh Lal* v. *Mohunt Bawan Das* (9);] *Bekora Sing Bundhoo* v. *Deen Dyal Lall* (10); *Gopee Shantra Mohapattar* v. *Kalee Pudo Banerjee* (11); *Watts* v. *Symes* (12); (remarks of *K. Bruce*, L.J., on *Toulmin* v. *Steere* (2)); *Bell* v. *Sunderland Building Society* (13); *Haydn* v. *Kirkpatrick* (14).

Mayne, and *Woodroffe*, for the Respondent *Rambux*, who as regards the three houses in question was second mortgagee, contended that the Appellant was not so entitled. He did not acquire the rights of the bank in the said three houses or keep the first mortgage alive as against the Respondent. Besides *Toulmin* v. *Steere* and the subsequent cases, they referred to *Oojagur Roy* v. *Ram Khelawan Singh* (15); *Chintaman Bhaskar* v. *Shivram Hari and Others* (16); *Ranchoddas Dayaldas* v. *Ranchoddas Nanabhai* (17); *Land Mortgage Bank* v. *Ramrutton Neoghy* (18); *Ramu Naikan* v. *Subbaraya Mudali* (19), where it was held that a prior mortgagee having purchased may still use his mortgage as a shield against subsequent mortgagees. *Garnett* v. *Armstrong* (20); *Parry* v. *Wright* (21); *Bhuggobutty Dossee* v. *Shamachurn Bose and Others* (22).

Kekewich, Q.C., replied.

(1) 2 Ch. Cas. 170.
(2) 3 Mer. 210.
(3) 1 P. Wms. 393.
(4) 5 Russ. 142, 148.
(5) 5 Ch. D, 634.
(6) Law Rep. 8 Ch. App. 1064.
(7) 2 K. & J. 650; 6 De G. M. & G. 642.
(8) Ind. Law Rep. 3 Cal. 307.
(9) Law Rep. 10 Ind. App. 62.
(10) 24 Suth. W. R. 47.
(11) 23 Suth. W. R. 338.
(12) 1 De G. M. & G. 240.
(13) 24 Ch. D. 683.
(14) 34 Beav. 645.
(15) 10 Suth. W. R. 384.
(16) 9 Bomb. H. C. R. 304.
(17) Ind. Law Rep. 1 Bomb. 581.
(18) 21 Suth. W. R. 270.
(19) 7 Mad. H. C. R. 229.
(20) 4 D. & War. 198.
(21) 1 S. & S. 369.
(22) Ind. Law Rep. 1 Cal. 337.

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The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

This is an appeal from an order of the Court of the Resident at *Hyderabad*, in the *Deccan*, dismissing an appeal from a decree of the Judicial Commissioner of the *Hyderabad* Assigned Districts, by which a decree of the Deputy Commissioner of the *Amraoti* district was affirmed. This decree was dated the 8th of August, 1879, and it was decreed by it that the Respondent *Rambux Seochand*, who was the Plaintiff in the suit, was entitled, as mortgagee, to possession of nine houses thereinafter described, and it was directed that he be put in possession thereof. The facts out of which the suit arose are as follows. On the 22nd of June, 1873, a firm carrying on business as bankers at *Amraoti* under the name of *Puranmull Premsukdoss*, by which name it has been sued, executed, by their manager *Bhairaodin*, a mortgage to *Rambux Seochand* of immoveable and moveable property at *Amraoti* for Rs.26,500, and interest. On the 18th of December the firm, having become further indebted to *Rambux Seochand* in Rs.40,000, executed in like manner to him a mortgage of other immoveable property in *Amraoti*, to secure the repayment of that sum, with interest. Of the nine houses which were the subject of the suit, and are described in the decree of the 8th of August, 1879, one was included in the former mortgage, and the other eight in the latter. The mortgagee was put in possession of six of the houses. As to the remaining three, the latter mortgage contained the following provision:—

"On account of the following three houses, which we have already mortgaged to the *New Bombay Bank* for Rs.30,000, reserving the mortgaged lien of the bank on these houses, we mortgage them to you in payment of the sum of Rs.16,000, subject to the condition that the *New Bombay Bank* has a prior right for the recovery of money due to it from those houses, and, after full recovery by it, you will be entitled to the balance, if any left. If the balance falls short, we ourselves will be responsible for the payment. At present, these houses being in the possession of the *New Bombay Bank*, we cannot put you in possession of them, and as soon as they will be redeemed, that is, as

soon as the bank's possession of them ceases, you should understand that they are put in your possession."

The Appellant, *Gokuldoss Gopaldoss*, having obtained a decree for about Rs.19,000 against *Puranmull Premsukdoss*, caused the nine houses to be attached and sold in execution of it, and in September, 1876, himself purchased the right, title and interest of *Puranmull Premsukdoss* in them. On the 21st of April, 1877, he paid the bank Rs.5,000 on account of the mortgage debt, and on the 10th of May, 1877, Rs.137. 2*a*. 10*p*. as payment in full of its claim upon the mortgage. The debt to the bank had previously been reduced. He appears to have taken possession of the nine houses, and on the 11th of July, 1877, *Rambux Seochand* brought a suit against him and *Puranmull Premsukdoss*, who was made the first Defendant, to recover possession of them, alleging that he was entitled to it under the two mortgages to him. And if the houses were not restored to him, he claimed the mortgage money and interest.

The defence of *Gokuldoss Gopaldoss* was that the mortgages to the Plaintiff were fraudulent and without consideration, and made to defeat creditors, and that the agent had no authority to execute them. And, further, as to the houses mortgaged to the *New Bombay Bank*, that he had paid the money due to the bank, and had obtained the right of mortgage thereon, and the Plaintiff could not claim them until they had been redeemed by *Puranmull Premsukdoss*. Issues were framed, the fourth being:—

"What was the effect of the payment made to the bank of *Bombay* in satisfaction of *Puranmull's* debt on the rights of the Plaintiff as mortgagee? Did possession vest in him thereupon?"

There was a dismissal of the suit by the Deputy Commissioner, and a remand by the Judicial Commissioner, of which it is not necessary to take any further notice. On the remand, the Deputy Commissioner found that the mortgages to the Plaintiff were "*bonâ fide*," that there was good consideration, that "possession passed to the Plaintiff in accordance with the terms of those deeds," and the Plaintiff was in possession when the Defendant attached the houses. Upon the fourth issue he held that when

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Gokuldoss had paid the debt to the bank, he stood to the Plaintiff in the exact position in which the mortgagor, first Defendant, would have stood had he redeemed the bank's mortgage, and that the effect of the payment to the bank was to entitle the Plaintiff to immediate possession of the houses mortgaged to it. He gave the Plaintiff a decree for possession of the nine houses, and directed him to be put into possession.

This judgment was affirmed on appeal by the Judicial Commisioner, and a special appeal therefrom to the Court of the Resident at *Hyderabad* was dismissed.

Two grounds have been taken in the appeal to Her Majesty in Council from the decree of the Resident; (1) that the mortgages to *Rambux Seochand* were not *bonâ fide* or made for good consideration; (2) that as regards the three houses in mortgage to the *Bombay Bank*, the Appellant was entitled to stand in the place of the bank, and to retain possession of them until the amount paid by him to the bank was repaid.

As to the first ground, there are concurrent judgments of the Lower Courts against the Appellant, and the propriety of them was not disputed at the bar. Consequently the appeal fails as to this ground, and altogether so far as it relates to six of the houses.

Upon the second ground the question is whether the doctrine in *Toulmin* v. *Steere* (1) should be applied in this case. In the judgment of Sir *William Grant*, M.R., in that case there is a passage to the following effect:—

"The cases of *Greswold* v. *Marsham* (2) and *Mocatta* v. *Murgatroyd* (3) are express authorities to shew that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice."

The authority of *Toulmin* v. *Steere* (1) has been much questioned, and it has been found upon examining the Registrar's book that *Greswold* v. *Marsham* (2) is no authority whatever for the proposition in support of which it has been usually cited (2 *Dart's* Vendor and Purchasers, 5th ed. p. 917). Vice-Chancellor *Hall*,

(1) 3 Mer. 210 (2) 2 Ch. Cas. 170.
(3) 1 P. Wms. 393.

in *Adams* v. *Angell* (1), shews in how unsatisfactory a state the law is upon this point. He says (at p. 641):—

"Doubtless those cases have been questioned. In *Gregg* v. *Arrott* (2) Sir *E. Sugden* said that he and Sir *Samuel Romilly* thought 'at the time' it was wrong; and in *Watts* v. *Symes* (3) Lord Justice *Knight Bruce* expressed doubts as to the decision. In the recent case of *Stevens* v. *Mid-Hants Railway Company* (4), Lord Justice *James* said as to *Mocatta* v. *Murgatroyd* (5), *Toulmin* v. *Steere* (6), and *Parry* v. *Wright* (7), 'Those cases, perhaps, some day will have to be reconsidered, but it is quite clear that their principle is not to be extended. Probably they are rendered innocuous by this, that conveyancers exclude their application by putting in three or four lines, saying that the original debt is to be considered as subsisting for the benefit of the person who has paid it off.' But the decision in *Toulmin* v. *Steere* (6) was recognised by Sir *George Turner* in *Squire* v. *Ford* (8), by Sir *J. Leach* and Lord *Lyndhurst* in *Parry* v. *Wright* (7), in effect by Lord *St. Leonards* in *Armstrong* v. *Garnett* (9), and by Lord *Cranworth* in *Otter* v. *Lord Vaux* (10). In *Anderson* v. *Pignet* (11) it was referred to by Lord *Selborne* as having been questioned by some persons, but his Lordship did not say that he approved or disapproved of it. It is said in some of the cases that the priority may be preserved."

When *Adams* v. *Angell* (1) came before the Court of Appeal, Sir *George Jessel*, M.R., said as to *Toulmin* v. *Steere* (6),—"Assuming it, however, to be binding upon us, it amounts to no more than this, that, in the case of a purchase from the owner of an equity of redemption, the purchaser with notice, whether actual or constructive, of other incumbrances, is not, in the absence of any contemporaneous expression of intention, entitled as against the other incumbrances of whose securities he has

(1) 5 Ch. D. 834.
(2) Ll. & Goo. 251.
(3) 1 De G. M. & G. 244.
(4) Law Rep. 8 Ch. App. 1069.
(5) 1 P. Wms. 393.
(6) 3 Mer. 210.
(7) 5 Russ. 142, 148.
(8) 4 D. & War. 198.
(9) 9 Hare, 60.
(10) 2 K. & J. 650; 6 De G. M. & G. 642.
(11) Law Rep. 8 Ch. 187.

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notice, to say afterwards that the incumbrances so paid off are not extinguished. It does not go beyond that, and there are several authorities which say that this doctrine is not to be carried further." This principle was acted upon in *Watts* v. *Symes* (1), where, as in *Toulmin* v. *Steere* (2), a first mortgage was paid off by the purchaser of the ultimate equity of redemption at the time of his purchase, and out of the purchase-money, but a declaration by the vendor that the first mortgage should be kept alive was considered sufficient to prevent a second mortgagee from treating it as extinguished.

In the case before their Lordships, the debt to the bank was not paid off out of the purchase-money. The Appellant purchased the interest of the mortgagor only, and did not in any way bind himself to pay off that debt. When he paid the bank, some six months afterwards, it was not because he was under an obligation to do so. This case might therefore be distinguished from *Toulmin* v. *Steere* (2); but their Lordships do not think it necessary to do this, as they are not prepared to extend its doctrine to *India*.

There are some decisions in *India* which their Lordships think they ought to notice. In *Gam Narayan Mazumdar* v. *Brajanath Kundu Chowdhry* (3), *A.* mortgaged certain lands to *B.*, and afterwards mortgaged the same to *C.*, who, having obtained a decree for the redemption of the mortgage to *B.*, paid off the debt to him; but it did not appear that he took an assignment of the mortgage. It was held by the High Court at *Calcutta*, on the authority of *Toulmin* v. *Steere* (2), that the first mortgage was extinguished and that a lease made by *A.* between the two mortgages was binding upon *C.* In *Itcharam Dayaram* v. *Raiji Jagha* (4), the High Court at *Bombay* held that, generally speaking, the purchaser of an equity of redemption, with notice of subsequent incumbrances, stands in the same situation as regards such subsequent incumbrances as if he had been himself the mortgagor; he can neither set up against such subsequent incumbrances a prior mortgage of his own, nor consequently a mortgage which

(1) 1 De G. M. & G. 244.
(2) 3 Mer. 210.
(3) 5 Beng. L. R. 463.
(4) 11 Bomb. H. C. R. 41.

he or the mortgagor may have got in. For this, *Toulmin* v. *Steere* (1), *Greswold* v. *Marsham* (2), and *Mocatta* v. *Murgatroyd* (3) are quoted. On the other hand the High Court at *Madras*, in *Ramu Naikan* v. *Subbaraya Madali* (4), held that a prior mortgagee, having purchased the ultimate interest, may still use his mortgage as a shield against the claims of subsequent mortgagees, saying that in later cases the Judges had sought to mitigate the rigidity of the doctrine of Sir *W. Grant* in *Toulmin* v. *Steere*. The doubts as to that case, or the propriety of introducing the doctrine of it into *India* as a rule of justice, equity, and good conscience, do not seem to have been considered by the High Court at *Calcutta* or *Bombay*.

The doctrine of *Toulmin* v. *Steere* (1) is not applicable to Indian transactions, except as the law of justice, equity, and good conscience. And if it rested on any broad intelligible principle of justice it might properly be so applied. But it rests on no such principle. If it did it could not be excluded or defeated by declarations of intention or formal devices of conveyancers, whereas it is so defeated every day. When an estate is burdened by a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course to have it assigned to a trustee for his benefit as against intermediate mortgagees to whom he is not personally liable.

In *India* the art of conveyancing has been and is of a very simple character. Their Lordships cannot find that a formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin* v. *Steere* (1) seems to them likely, not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense, and to litigation.

The obvious question to ask in the interests of justice, equity, and good conscience, is, what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no

(1) 3 Mer. 210.
(2) 2 Ch. Cas. 170.
(3) 1 P. Wms. 393.
(4) 7 Mad. H. C. R. 229.

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express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest. In the familiar instance of a tenant for life paying off a charge upon the inheritance, he is assumed, in the absence of evidence to the contrary, to have intended to keep the charge alive. It cannot signify whether the division of interests in the property is by way of life estate and remainder, or by way of successive charges. In each case it may be for the advantage of the owner of a partial interest to keep on foot a charge upon the corpus which he has paid.

Their Lordships are of opinion that the Lower Courts in this case were wrong in holding that the Appellant was in the same position as the mortgagor. They hold that the mortgage to the bank was not extinguished, and that the Appellant, the second Defendant, had a good defence to the suit for possession of the three houses included in that mortgage. They will therefore humbly advise Her Majesty that the decree appealed from should be modified by omitting from it the houses which are described in it under the numbers 4, 5, and 6, and by dismissing the suit so far as it regards those houses with costs in the Lower Courts in proportion. And as the Appellant has failed on the question of the validity of the mortgages to *Rambux Seochand*, they make no order as to the costs of this appeal.

Solicitors for the Appellant: *Merriman, Pike, & Merriman.*

Solicitors for the Respondent *Rambux Seochand*: *Sanderson & Holland.*

THAKUR ISHRI SINGH . . . . . PLAINTIFF;

AND

BALDEO SINGH . . . . . DEFENDANT.

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Feb. 8, 12.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Construction—Will or Transfer inter vivos—Act 1 *of* 1869, *ss.* 19, 11—*Family Custom as to Descent of Impartible Estate.*

Case in which it was held that an instrument which had been executed by a talukdar (reserving a life interest) for the purpose of effecting after his death a transfer of property to the Respondent must, having regard to its substantial characteristics, to its answering the definition of a will contained in sect. 2 Act I. of 1869, and to its having been registered as a will, and setting aside mere technical expressions such as "tamlik," be regarded as a will and not as a transfer operating *inter vivos*.

Held, that Act I. of 1869, s. 11, which gives not only to the original talukdar, but to every heir and legatee of a talukdar, power to transfer or bequeath the estate granted to him, is not controlled in its operation by the proviso to sect. 19. That proviso, to the effect "that nothing herein contained shall affect wills made before the passing of the Act," relates to the provisions contained in sect. 19 and not to those contained in the whole of the Act, and therefore does not control sect. 11.

Although an impartible estate will, if there is no indication to the contrary, descend according to the law of primogeniture: *held*, in this case, where the talukdari has been entered in list 2 and not in list 3, that a rule of selection and not primogeniture was the governing rule of the family.

APPEAL from a decree of the Judicial Commissioner (March 19, 1881), affirming a decree of the District Judge of *Lucknow* (Oct. 23, 1880), which dismissed the Appellant's suit with costs.

At the settlement of *Oudh*, which was effected in the year 1858–9, taluka *Kanhmow*, comprising talukas *Kanhmow*, *Hasnapar*, *Usri*, and *Nimchaina*, was settled with *Thakur Beni Singh*, since deceased, the former proprietor thereof, as the talukdar.

Shortly afterwards, in reply to a circular addressed to him in common with the other talukdars of *Oudh*, *Beni Singh* submitted

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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an unsigned petition dated the 20th of February, 1860, in which it was stated that by family custom one male member thereof selected for his fitness, without reference to seniority, had succeeded as talukdar, and the Government was requested after his death to select as his successor that one of his sons whom it might deem most fit.

Government apparently declining the responsibility, that document was returned as informal, and *Thakur Beni Singh* thereupon subscribed and submitted the following formal declaration of his intentions with respect to the devolution of taluka *Kanhmow* after his death :—

"Whereas the British Government has granted to me, for generation after generation, the proprietary rights in the ilaka *Kanhmow*, situate in pargana and tehsil *Bari;* taluka *Usri*, situate in pargana *Pirnaga*, tehsil *Sitapur;* taluka *Hasnapur*, situate in tehsil *Biswan*, and taluka *Nimchaina*, situate in pargana *Maholi*, tehsil *Misrikh*, I desire and hereby pray that after my death my ilaka (estate) be maintained entire and undivided by my family, according to the custom of 'Raj-gaddi,' and that the younger brothers be entitled to receive maintenance from the person in possession of the estate (gaddi-nashin).

"(Signed) *Beni Singh*, talukdar of *Kanhmow*, &c.,
"Dated 8th of March, 1860. "in tehsil *Bari*."

Thakur Beni Singh's name was duly recorded in lists 1 and 2, prepared under sect. 8 of Act I. of 1869, and published under sect. 9 of that Act in the *Gazette of India* of the 31st of July, 1869, as talukdar of taluka *Kanhmow*.

On the 19th of September, 1870, *Thakur Beni Singh* died, leaving him surviving three sons, *Maharaj Singh*, since deceased, the Appellant, and the Respondent.

Both *Maharaj Singh* and *Ishri Singh* claimed mutation of names in the Collector's register, which was on the 1st of February, 1871, ordered in favour of *Maharaj Singh*. This order having been contested by *Ishri Singh*, was finally confirmed by the Chief Commissioner of *Oudh* on the 22nd of September, 1871.

On the 28th of June, 1871, about five months after the order

for mutation of names in his favour, *Maharaj Singh* executed the document C, which ran as follows :—

"I, *Maharaj Singh*, am the talukdar of *Kanhmow*, &c., in the *Sitapur* district.

"Whereas—I hold and enjoy possession of my estate situate in the *Sitapur* district, of which the Government revenue is about Rs.16,000, I, while in the enjoyment of sound health and mind, without reluctance or coercion, assign (tamlik) the said property to my younger brother, *Baldeo Singh*, subject to the following conditions :—

"1. That during my lifetime, I shall hold and enjoy possession of it; and that after my death my aforesaid brother *Baldeo Singh* shall hold and enjoy the same like myself;

"2. That whereas I am childless, should a legitimate and self-begotten child be born to me, it shall become the owner of one-half of the estate, and *Baldeo Singh* shall be the owner of the other half;

"3. That after my death *Baldeo Singh* shall be bound like myself to maintain and take care of my wife. Hence I have written out these few words in the way of a deed of assignment (tamliknamah) so that it may witness in future.

"Dated 28th of June, 1871."

The document was duly signed and attested by three witnesses. On the 1st of July, 1871, the *Registration Act* (VIII. of 1871) came into force, and on the 3rd of July, 1871, the document was registered according to its provisions as a will.

On the 19th of November 1879, *Maharaj Singh* died without issue, never having had any.

On the 13th of December, 1879, the Respondent, and on the 15th of December, 1879, the Appellant applied for mutation of names and possession of the estate under sect. 65, Act. XVII. of 1876. In these proceedings this Appellant referred to the document dated the 28th of June, 1871, objecting that it could not be considered as a will, as it was styled in the body of it a tamliknamah.

On the 20th of December, 1879, the Deputy Commissioner of *Sitapur*, holding the document of the 28th of June, 1871, to be

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a will, directed mutation of names with respect to the taluka in favour of the Respondent.

In consequence of the revenue authorities thus recognising *Baldeo Singh*, the Appellant on the 1st of March, 1880, filed his plaint praying that the order of the Deputy Commissioner, dated the 20th of December, 1879, might be set aside; that the document C (the validity and binding effect of which he for various reasons questioned and impugned) might be declared null and void; and that he might be decreed possession of taluka *Kanhmow* (being the property mentioned in schedule A of the plaint) as being the person entitled thereto on the death of *Maharaj Singh*, intestate, and without issue, under the provisions of his father's will of the 8th of March, 1860, and clause 6, sect. 22 of Act I. of 1869, and of the property moveable and immoveable, other than taluka *Kanhmow*, of which *Maharaj Singh* had died possessed (being that mentioned in schedule B of the plaint) by right of succession, according to family custom, on the death of his said brother dying intestate.

Both Courts dismissed the suit.

The material passage in the judgment of the Judicial Commissioner is as follows:—

"The second issue is whether this document C is a tamliknamah, deed of settlement, or a will.

"It is registered as a will, although in the body the word 'tamlik' is used, and it bears a stamp which is not required for a will, but would be required for a deed of settlement, tamliknamah not being a will. It certainly is not an out and out deed of gift (hibbeh) of the property, but it is a transfer of the title. A settlement subject to the transferor retaining possession and control of the property during his life, and other conditions in the event of a son being born to or the wife surviving the transferor, and it is also a clear expression of the talukdar's wishes as to the disposal of the estate after his death. Whether the talukdar could have revoked it during his lifetime need not be decided, as I hold that there is no evidence to prove that he ever did revoke it or even form an intention to do so. That the document did express the executant's wishes at the time of registration is clear; for the Registrar distinctly swears that *Maharaj*

Singh, when told that it purported to be a tamlik-namah, but should be registered as a will, said be what it may this is the document to be registered according to rule."

Woodroffe, for the Appellant, contended that document C was not a will within the meaning of Act I. of 1869. It purported to be a transfer by way of gift. As such it was invalid under sect. 17 of Act I. of 1869 by reason of possession not having been given. Regarded as a will, it was invalid as being *ultrà vires* the testator. The estate was governed by the declaration of *Beni Singh* made on the 8th of March, 1860. That declaration was tantamount to a will: see *Hurpershad* v. *Suledial* (1). It fixed the character and incidents of the estate, and *Maharaj Singh* could not depart from it. Reference was made to sects. 11 and 19 of Act I. of 1869. The meaning of that declaration was that *Beni Singh* intended that his estate should devolve in the mode by which properties of an impartible character held by a family under the Mitakshara law would descend, except so far as that law was modified by custom. There was nothing in the impartible character of the taluk to enable the holder to deprive the other members of the family of their joint interest, including their right by survivorship. The other sons of *Beni Singh* had rights, and but for impartibility each would by survivorship have been entitled to share in the enjoyment. According, however, to the custom of the family, possession and enjoyment devolved on the eldest; there is no proof of any custom to the contrary. *Maharaj Singh* did not in fact get an exclusive title to the whole estate. He could not do so under his father's declaration: *Ramnarain Singh* v. *Pertab Singh* (2). Exhibit C being out of the question the title to the properties comprised in list A did not pass thereby to the Respondent, and the Appellant succeeded thereto as the eldest surviving son of *Beni Singh*.

Then with regard to the properties in list B, the case has not been properly tried. Exhibit C did not affect these. The eighth issue was altered so as to exclude a material question; viz., whether the ordinary law of inheritance applied thereto. As to the power

(1) Law Rep. 3 Ind. Ap. 276, 277.

(2) 1 Beng. L. R. 402.

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and duty of the Court to amend the issue, see *Arbuthnot* v. *Betts* (1). The Appellant was in law entitled thereto, either as to the whole of it or as to half. The whole of it, if it devolved upon a single heir as impartible property; the half, if the ordinary law of the Mitakshara applied. The issue was so framed as to exclude this latter alternative, that is, the question as to a custom of impartibility relating thereto was never tried: *Mayne's* Hindu Law, sect. 461; *Achal Ram* v. *Uddit Partab Adhya* (2); *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (3).

Cowie, Q.C., and *Sykes*, for the Respondent, contended that the Courts below rightly held that document C was a valid and operative will and that thereby the full proprietary right in the property in list A passed to the Respondent, and that as regards the property in list B the Appellant had not made out any title either by family custom or by the ordinary law of inheritance. Impartibility implied descent to a single heir, but there was no proof of a custom of descent necessarily in favour of the eldest son or a brother. The Respondent was in possession, and the evidence, while it failed to prove a custom in favour of the Appellant, pointed to a power of selection which had been exercised in favour of the Respondent.

Woodroffe, replied.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE:—

This case has been argued so recently that the introductory facts need not be recapitulated. It will be sufficient to bear in mind that the suit concerns property of two classes, that comprised in list A and that comprised in list B, to which quite different considerations apply.

With respect to the property in list A, the whole controversy turns upon the validity and the character of the instrument which is marked as exhibit C in the cause, being an instrument executed

(1) 6 Beng. L. R. 273. (2) *Ante*, p. 51.
(3) Ind. L. R. 4 Mad. 266.

on the 28th of June, 1871, by *Maharaj Singh*, for the purpose of effecting a transfer of the property contained in it to *Baldeo Singh*, the Respondent. It will be convenient, first, to consider the character of the instrument, because certain arguments were advanced against its validity depending entirely on the hypothesis that it is a transfer operating *inter vivos*, and their Lordships have come to the opposite conclusion, namely, that it must be considered as a will.

The reasons for considering it to be a will are these:—It answers the definition of a will which is contained in sect. 2 of Act I. of 1869. It was registered as a will, and though that may have been done at the instance of the Registrar, it certainly was done with the full knowledge and assent of *Maharaj Singh*. It provides for contingencies which are not ascertainable, or may not be ascertained, until the death of the testator; for instance, the contingency of his having a child, which he had not at the time of the will, and the contingency of his leaving a widow surviving him. It does not purport to give to anybody any possessory or present interest until the death of *Maharaj* the donor. And it makes a gift to the children of *Maharaj*, which, if it be a deed of transfer operating at once, cannot take effect, because no child was in existence; whereas, if it is a will, the gift may perfectly well take effect. All those are very strong indicia of a testamentary character; and the question is whether they are overborne by evidence tending in the opposite direction?

As regards judicial opinion, it may be observed that the question of will or deed was in issue between *Baldeo* and *Ishri* after the death of *Maharaj*, before the Deputy Commissioner of *Sitapur*, upon the application for mutation of names; and he held it to be clearly a will. The Judicial Commissioner in the present case gives no opinion upon the point. The District Judge thinks it is a deed, though he says it is not very material whether it is held to be one or the other. His reasons for thinking it to be a deed are that the donor *Maharaj* uses the word "tamlik" ("assign") and calls his deed a tamliknamah, and he has it stamped as if it were a deed. It appears that the stamp is not exactly that which the instrument would bear if it were a deed of

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assignment, but the District Judge says it is not so far distant from it but that it carries to his mind a conviction that the stamp, coupled with the use of the name, shews that *Maharaj* intended something different from a will. Then he says that it cannot be a will, because it affects the property in the lifetime of *Maharaj;* but that seems to their Lordships to be an assumption of the question. Of course if it affects the property in the lifetime of *Maharaj* it cannot have a testamentary character, but the very question is whether it does affect the property in the lifetime of *Maharaj.* The District Judge does not assign any additional reasons for thinking it does affect the property in that way.

Mr. *Woodroffe*, in his argument, relied very strongly upon the use of the word "assign," and upon the reservation of a life interest to the donor. No doubt both those circumstances tend towards the conclusion to which Mr. *Woodroffe* wished to lead their Lordships, but they are by no means conclusive. If they had been the words of an English conveyancer preparing an English instrument, they would have afforded a very strong argument; but the instrument was prepared by *Lal Sundar*, and we must not construe with too great nicety, or assign too much weight to, the exact words that he uses for a transfer of property, as if he were accurately weighing the difference between a testamentary instrument and one operating *inter vivos*. We must remember that wills are comparatively new in any part of *India*, and are of more recent introduction in *Oudh* in respect to this class of property. So with respect to the reservation of a life interest. The will being not a very familiar instrument to the people who prepare it or who sign it, the testator often does express a great anxiety that he shall not be considered to have parted with anything in his lifetime, and their Lordships have seen here instruments which most unquestionably were wills, and intended to operate as such, in which nevertheless there have been expressions upon the face of them intimating that the testator intends to remain the owner of his property until he dies.

Upon the whole, therefore, looking at what are the substantial characteristics of the document which have been referred to,

setting aside mere matters of form and what may be considered as technical expressions, their Lordships think that the reasons for holding it to be a will have a decided preponderance over those which would lead them to hold it to be a deed.

It remains to consider the objections to the validity of the instrument considered as a will. First, it was said that the disposition made by it was beyond the power of *Maharaj Singh*, because the property was governed by a previous will or declaration, whichever it may be, of *Beni Singh*, dated the 8th of March, 1860, which fixed a character upon the property that no subsequent possessor could depart from. The answer to that is that Act I. of 1869, s. 11, gives not only to the original talukdar, but to every heir and legatee of a talukdar, power to transfer or to bequeath the estate which is granted to him. It was suggested that sect. 11 is controlled by sect. 19, in which there is a proviso "that nothing herein contained shall affect wills made before the passing of this Act." But sect. 19 is for the purpose of applying to wills made under Act I. of 1869 a number of sections contained in the *Indian Succession Act;* and their Lordships are of opinion that the proviso only applies to the sections or provisions contained in sect. 19, and not to those contained in the whole of Act I. of 1869.

Then it is said that there was undue influence used to coerce *Maharaj Singh* into executing the instrument. On that point there is the finding of both the Courts below against the Appellant, and the subject-matter is one on which this Board would be exceedingly reluctant to disturb concurrent findings of the Court below. But it is said that they ought to be disturbed, because evidence of undue influence was tendered and rejected. It becomes important then to see whether there was any evidence tendered for the purpose of shewing any undue influence. It is not shewn that any such evidence was tendered, excepting what is called a revocation, or an attempt to revoke, by *Maharaj*, long after the date of the instrument in question. Now of course it might happen that a revocation or an attempt to revoke should be accompanied by circumstances shewing that undue influence had been used in procuring the execution of the instrument or throwing light upon that question. But no such circumstances are

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suggested. In the argument of counsel, in the record, nothing is spoken of but the bare fact of what is called the revocation, which it is said is a relevant fact corroborative of another relevant fact, viz., the undue influence. On the passage which shews how the Court dealt with the matter, the same remark occurs. And the reasons given for appealing to the Judicial Commissioner's Court seem to make it quite conclusive that no other evidence was tendered. There are two separate reasons in the record, one relating to undue influence and the other relating to the revocation. The one relating to undue influence uses this language: "From the time when and the manner in which document C was executed, and the circumstances under which such an unnatural and unusual disposition of a valuable property was unnecessarily made by *Maharaj Singh*, the presumptions and probabilities are very strong in support of the oral evidence adduced by the Plaintiff in proof of the document having been obtained by means of fraud, misrepresentation, coercion, and undue influence." That raises the whole question as to what occurred at the time when the document was executed; and no evidence was excluded on that point. Then the 18th reason for appeal is; "The Lower Court is wrong in having excluded oral evidence of the cancellation of the document C by *Maharaj Singh*"; and it goes on to argue that oral evidence of that fact was admissible. So that it is quite clear that the fact alone was to be proved by the rejected evidence, and it is impossible to suggest that the fact standing alone would have any bearing on undue influence used on the execution of the instrument.

All the other arguments against its validity, as to its return into *Maharaj's* hands, its cancellation, the non-delivery of possession, and so on, turn upon the hypothesis that the instrument was a transfer and not a will; and therefore it is not necessary to make any further observations upon them. The consequence is that all the objections to exhibit C fail; and as to list A, the suit must be decided against the Appellant.

Now their Lordships come to list B, which comprises things not affected by exhibit C. With respect to that property there was an alteration in the issue settled by the First Court, and a

great deal of argument was used to shew that there ought to have been no such alteration; but it is quite clear that the Appellant is not damnified by it, whether it was right or wrong. If he could claim the whole of the property and when that was decided against him could fall back and claim half, he might possibly be injured by the alteration of the issue; but he cannot do that, because the impartibility of the property is and always has been common ground between him and the Respondent. Treating the property as impartible, the case can be argued in favour of the Appellant just as well under the issue as it stands as it could be argued under the issue as it was originally framed.

As the issue stands the argument is presented in this way: Mr. *Woodroffe* says that as between *Beni* and his three sons the latter take by way of unobstructed inheritance; that if the property had been subject to the ordinary law of the Mitakshara, on *Beni's* death the three sons would have taken; but it is impartible property, and therefore the eldest son *Maharaj* took the whole; on the death of *Maharaj* the question comes, who is the heir to *Beni;* and again, the estate being impartible, the eldest must take the whole. And a passage was read from Mr. *Mayne's* "Hindu Law," referring to authorities, and saying that in general such estates—that is, impartible estates—descend by the law of primogeniture.

Now however true it may be that, if there is absolutely nothing to guide the mind to any other conclusion, an impartible estate will descend according to the law of primogeniture, it is impossible to say that there is no such guide in this case. As to the taluka, there is a great deal of evidence to the effect that the law of primogeniture has not prevailed. On the 20th of February, 1860, *Beni Singh*, the then talukdar, being called upon to state what the law of devolution of the estate is, says:—"The usage established by prescription in petitioner's family is still in force; namely, that out of several sons an able one had up to this time been selected and nominated as talukdar, without reference to seniority"; and then he prays that the Government will select an able one. That is to say, according to him, that law which is

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familiar to us under the name of tanistry, or something very like it, prevailed in his family.

On the 8th of March, 1860, *Beni Singh* executed an instrument by which he states his desire that after his death his estate shall be maintained in his family entire and undivided according to the custom of raj-gaddi, the younger brothers receiving maintenance from the gaddi-nashin, the successor to the estate for the time being. That document is not without ambiguity, but it does not assert the law of primogeniture with clearness.

The next document is a parwana, issued by the Deputy Commissioner of *Sitapur* to *Beni Singh* on the 19th of August, 1861; and it seems to have been issued because the Government had not been told with exactitude what the rule of succession was or was to be. The parwana runs thus:—"You are instructed that if the rule of primogeniture or the custom of Masnad Nashing be not in force in your family, it is essentially necessary that you should execute a will naming your successor therein." Now *Beni Singh* does not reply to that, that the rule of primogeniture was in force in his family, and therefore he did not wish to execute a will; but he answers, "In compliance with your order conveyed in the foregoing letter, I will execute my will in favour of an heir." It does not appear that *Beni Singh* did execute any will, but he promised to make a will on the footing that the rule of primogeniture was not in force in his family.

The next act is the formation of the lists of talukdaris; and in that important operation we find the taluka entered, not in list 3 which contains the primogeniture estates, but in list 2, which contains the estates which go to a single heir.

Now in all these proceedings it is the taluka or the property comprised in list A which is the main object, though statements are made in general terms as to the custom of the family. But in 1872 a suit was instituted by *Ishri*, the present Appellant, to recover from *Maharaj Sing* the taluka, and also moveable property valued at Rs.84,000. *Baldeo Singh* was also made a defendant to the suit, so that whatever was decided in that suit was decided between the parties to this appeal. The Rs.84,000 would seem to come under the same consideration as the move-

ables in list B in the present suit. It is observable that in the present suit list A contains no moveables at all. All the moveables are in list B; and though it is not so clear as might be wished, the probability is that the moveables which were the subject of the suit of 1872 were governed by the general custom of the family.

In that suit *Ishri* filed a written statement in which he says, "On the 20th of February, 1860, Plaintiff's father, by a will of the same date,"—meaning the statement made to the Government,—"stated the family usage regarding succession, which Plaintiff's father desired to be followed after his death." Then he is examined; and in his examination he says, "In my family the eldest brother has never succeeded to the taluka;" and he gives one or two instances to shew that such is the fact. In giving judgment the Deputy Commissioner of *Sitapur* observes that all he has to consider is the Plaintiff's title to the taluka *Kanhmow*. He takes a distinction between the considerations that apply to the taluka *Kanhmow* and the considerations that apply to *Nimchaina*,—something which was the subject of a subsequent grant; but he takes no distinction between the considerations that apply to taluka *Kanhmow* and those which apply to the moveables on which he is deciding.

The case set up by *Ishri* principally consisted of a document which was held to be forged, and it is remarkable that in that document he continues to put into *Beni's* mouth the assertion of the principle that the ablest person is to succeed—and after extolling the intelligence and gravity of temper and other good qualities of *Ishri Beni* is made to say in the forged instrument that he desires *Ishri* to succeed him in preference to *Maharaj* or *Baldeo*. But the Deputy Commissioner of *Sitapur* dismissed the suit on the ground that though there was evidence that it was the custom of the family for the most able to succeed, there was no evidence that *Ishri* had been selected as such. Towards the end of his judgment he says, "There is no doubt that this was the custom in most talukas in this district, and was probably the custom of the smaller talukas in the greater part of *Oudh*. Wills however at that time were unknown."

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That seems very like a decision with regard to property other than the taluka, that tanistry rather than primogeniture was the governing rule of the family. Even if the decision concerns the taluka alone, their Lordships consider that the District Judge in this case is quite right when he argues from the law relating to the taluka to the law relating to all the other family property, and says there is a presumption from the actual decisions relating to the taluka that the family property followed the same law, or rather, as he puts it accurately, there is no evidence to shew that the other family property followed a line of devolution different from that of the taluka.

Whether the evidence would prove the case as regards list B in favour of the Respondent if he were the party claiming and the Appellant were in possession, is not now the question. The question is, whether the Appellant, having the *onus probandi* on him to shew that primogeniture is the law of the family, has proved his case; and he certainly is very far indeed from proving his case, the evidence so far as it goes being the other way.

The Appellant therefore fails on all his points; and their Lordships will humbly advise Her Majesty that the appeal be dismissed with costs.

Solicitors for appellant: *Watkins & Lattey.*
Solicitor for respondent: *W. Buttle.*

RAJAH RUP SINGH . . . . . PLAINTIFF;

AND

RANI BAISNI AND THE COLLECTOR OF ETAWAH . . . . . DEFENDANTS.

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Feb. 12, 13, 14, 15, March 22.

ON APPEAL FROM THE HIGH COURT FOR THE NORTH-WEST PROVINCES.

Mitakshara Law—Ancestral impartible Raj—Exclusion of Females—Nearest male Heir preferred to Widow—Impartible Estate not separate if Family joint—Custom.

Held, on the evidence in the case, that the raj in question was an ancient raj and an ancestral estate, and that by virtue of an ancient custom in the family it was impartible.

According to the Mitakshara the estate being ancestral and the family undivided, the Plaintiff as the nearest male heir of the deceased Rajah and the surviving member of the undivided family was entitled to succeed to the raj in preference to the widow.

A female cannot inherit an impartible ancestral estate belonging to a joint Hindu family governed by the Mitakshara when there are any male members of the family who are qualified to succeed as heirs.

Maharani Hirunath Koer v. *Baboo Ram Narain Singh* (1) approved.

Held, in this case, that such law was not shewn to have been modified by an ancient uniform custom in favour of the widow.

An ancestral estate even though impartible is not the separate or self-acquired estate of the single member upon whom it devolves so long as the family continues joint.

Chintamun Singh v. *Mussumut Nowlukho Kunwari* (2) approved.

APPEAL from a decree of the High Court (May 7, 1880), affirming a decree of the Officiating Judge of *Mainpuri* (Sept. 25, 1878) which dismissed the Appellant's suit for possession of the estate of raj *Bhara* by right of succession as customary heir to his nephew Rajah *Mahander Singh* deceased.

The facts and proceedings are stated in the judgment of their Lordships.

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) 9 Beng. L. R. 274. (2) Law Rep. 2 Ind. Ap. 263.

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The judgment of *Stuart*, C.J., was as follows:—

"On the evidence, which was fully gone into at the hearing, and which I have since carefully considered, I am satisfied that the conclusion of the Judge is right, summing-up, as he does, the whole case with these two determinations: first, that the Plaintiffs' contention that widows never succeed to a raj in this part of *India* is unfounded; and secondly, that there is evidence to shew that in the family to which the possessors of this raj (estate) belong, the custom is that the childless widow is not excluded by collaterals. Several authorities were referred to at the hearing, including the case of *Maharani Hiranath Koer* v. *Baboo Ram Narain Singh* (1), in regard to which the pleader for the Appellant stated that the head-note of the report of that case exactly stated his. This head-note is: 'A female cannot inherit an impartible ancestral estate belonging to a joint Hindu family, governed by the Mitakshara, where there are any male members of the family who are qualified to succeed as heirs. This is a rule of law, and not dependent on custom. A custom modifying the law must be a custom to admit females, not a custom to exclude them.' Here, however, there is evidence of a custom by which the widow, failing direct descendants, is not excluded by collaterals; and that in regard to a raj generally the whole authorities go to this, that impartibility of estate involves primogeniture in succession; and that the childless widow, when she does take by force of a family custom, takes simply in her own person for her lifetime. In the present case the Plaintiff is the uncle of the deceased Rajah, whom he claims to succeed, and he is therefore not within the rule modified to the extent I have stated in favour of the widow."

Leith, Q.C., and *Doyne*, for the Appellant, contended that the presumption of law was in favour of the family to which this raj belonged being joint, which had not been displaced by evidence of partition. Assuming the family to be joint, then by the Mitakshara law, which applies to the case, the male collateral excludes the widow. There was no evidence of a custom to the

(1) 9 Beng. L. R. 274.

contrary. It was unnecessary to shew a custom excluding the widow. The ordinary law under the circumstances of the case excluded her. It was for the other side to shew a custom admitting her applicable to this family and estate. The Appellant was the nearest male relative of the deceased Rajah. The evidence shewed that the raj was an impartible estate which had always been held by a single member of the family, and had passed from father to son according to the law of primogeniture for several generations—nearly seven centuries. Reference was made to *Chintamun Singh* v. *Mussumut Nowlukho Konwari* (1); *Katama Natchiar* v. *Rajah of Shivagunga* (2); *Maharani Hiranath Koer* v. *Baboo Ram Narain Singh* (3); *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (4); *Baboo Gunesh Dutt Singh* v. *Maharajah Moheshur Singh and Others* (5); *The Hunsapore Raj Case* (6); *Ramalakshmi Ammal* v. *Sivananatha Perumul Sethurayer* (7).

Graham, Q.C., and *Woodroffe*, for the Collector, contended that the Appellant had set up a custom of descent which totally excluded women, and had failed to prove it. The evidence shewed that by the custom of the family a childless widow excludes collaterals. With regard to the presumption as to custom, see *Maharani Hiranath Koer* v. *Baboo Ram Narain Singh* (8); *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (9). Both Courts have found in favour of a custom by which widows exclude collaterals. Consequently the Appellant is not entitled even if the raj were joint. The Appellant, moreover, had been proclaimed a rebel during the Mutiny and his property confiscated. He had thereby lost his status and rights as a member of the joint family. Reference was made to Act IX. of 1859, s. 18; *cf.* Acts XIV. and XVI. of 1857. This raj must not be assumed to be an ordinary ancestral estate; the Appellant himself relied on a custom and did not allege the application of the ordinary Mitakshara law. The principle of survivorship does

(1) Law Rep. 2 Ind. Ap. 263.
(2) 9 Moore, Ind. Ap. 539.
(3) 9 Beng. L. R. 274.
(4) 9 Moore, Ind. Ap. 74.
(5) 6 Moore, Ind. Ap. 164.
(6) 12 Moore, Ind. Ap. 1.
(7) 14 Moore, Ind. Ap. 585.
(8) 9 Beng. L. R. 283.
(9) 9 Moore, Ind. Ap. 66.

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not apply to an impartible raj. For a definition of "raj" see *Harrington's* Analysis, vol. iii., p. 329; *The Tipperah Raj* (1). The title to succeed to a raj is by heirship: see *Baboo Gunesh Dutt Singh* v. *Maharajah Moheshur Singh and Others* (2); *Rajkissen Singh* v. *Ramjoy Surma Mozomdar* (3); *Thakoor Teetnath Sahee Deo* v. *Lokenath Sahee Deo* (4).

C. W. Arathoon, for the Respondent *Rani Baisni.*

Leith, Q.C., replied.

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The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a decision of the High Court of Judicature for the *North-Western Provinces* by which a decree of the Judge of *Mainpuri* in favour of the Defendants, the present Respondents, dismissing the Plaintiff's suit, was affirmed. The Appellant, who was the Plaintiff, sued for possession of the estate called raj *Bhara*, comprising the villages and other moveable and immovable properties specified in the schedules annexed to the plaint by right of succession to the deceased Rajah *Mahander Singh*, according, as stated in the plaint, "to the custom prevalent in other estates and the usage of the family of the Rajah of *Bhara*."

The Plaintiff in his plaint stated that:—

"The ancient usage of the Rajah of *Bhara*, in common with the other families of the Rajahs, is that, after the decease of a Rajah, his nearest and eldest male heir succeeds him, to the exclusion of the other male heirs and the total exclusion of women. That when Rajah *Mahander Singh* died on the 22nd of September, 1871, the revenue authorities caused the name of his widow to be recorded, notwithstanding the presence of the Plaintiff, the nearest heir; that they subsequently placed the estate under the management of the Court of Wards, who fixed an allowance of Rs.50 for the Plaintiff, which he still receives."

The Rani, Defendant, in her written statement stated, amongst other things, that the custom alleged by the Plaintiff had no

(1) 12 Moore, Ind. Ap. 523.
(2) 6 Moore, Ind. Ap. 164.
(3) Ind. L. R. 1 Calc. 195.
(4) 19 Suth. W. R. 239.

existence; that there was nothing in the history of the family of the Rajah of *Bhara* to prove that a widow was ever deprived of the possession of the estate of her husband in the presence of the male relatives of her deceased husband; that as the property of her deceased husband was separate she was, under the general rules of the Hindu law, entitled to enjoy it during her lifetime; that the Plaintiff bore a very bad character; that he had taken arms against the Government during the mutiny, and was guilty of many atrocities; and his property was confiscated and made over to *Lala Laig Singh.*

The Collector, as manager under the Court of Wards, also appeared and defended the suit. He in his written statement stated that the family custom alleged by the Plaintiff did not exist; that the Plaintiff and his nephew, the late Maharajah, were separate in estate, and that, therefore, according to the ordinary rules of Hindu law, the Rani, Defendant, was entitled to succeed to the property of her deceased husband in preference to the Plaintiff.

The raj, although it was not proved ever to have been a principality in the strict sense of the word, or endowed with sovereign rights, was an ancient ancestral impartible estate which had always been held by a single member of the family at a time, and had passed for several generations in lineal succession according to the law of primogeniture.

Pertab Singh, the father of the late Rajah, *Mahander Singh*, was the elder brother of the Plaintiff, who, as a younger brother, became entitled, according to the usage of the family, to maintenance, and for some time after the death of his father received an annuity of Rs.1000 out of the estate of the raj. The family was joint and undivided down to the time of the Indian Mutiny; but it appeared that, in consequence of the Plaintiff's misconduct during the disturbances, payment of his annuity was withheld with the sanction and under the direction of Government, and that in a suit against the manager of the Court of Wards to enforce payment during the minority of the late Rajah, it was held that there had been that which, adverting to the nature of the property, was equivalent to an attachment thereof, and the suit was dismissed. There had not, however, been any adjudication of forfeiture under Act XXV. of 1857, nor had any proceeding

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ever been taken under that Act with reference to the estate itself.

It was contended on the part of the Defendants that, in consequence of the proceedings with reference to the maintenance annuity, the legal status of the Plaintiff was altered, and that he ceased to be a member of the joint family.

Their Lordships are clearly of opinion that there is no foundation for contending that the stoppage of the annuity, and the proceedings in respect thereof, amounted to a confiscation of the estate, or in any manner altered the status of the Plaintiff as a member of the joint family.

The Mitakshara is the Hindu law of inheritance in the district in which the estate is situate, and it is clear that according to that law, in the absence of any special custom to the contrary, the Plaintiff as the uncle of the deceased Rajah, and the surviving member of the joint family, was entitled to succeed to the ancestral estate upon the death of his nephew. According to the Mitakshara a widow is not entitled to succeed to her husband's estate in preference to collateral male heirs, unless he is separate, or as in the *Shivagunga* case, his estate was separate or self-acquired (see Mitakshara, cap. 2, sect. 1, pars. 8-19, and 30 and 31, note).

The cases were all reviewed by the late Chief Justice of Bengal, Sir *Richard Couch*, in the case of *Maharani Hironath Koer* v. *Baboo Ram Narayan Singh* (1), in which, in a careful and well considered judgment, it was held that a female cannot inherit an impartible ancestral estate belonging to a joint Hindu family, governed by the Mitakshara, when there are any male members of the family who are qualified to succeed as heirs; that this is a rule of law not dependent on custom, and that a custom modifying the law must be a custom to admit females, not a custom to exclude them. That case was upheld by the Judicial Committee in the case of *Chintamun Singh* v. *Mussumut Nowlukho Konwari* (2), and their Lordships are of opinion that it was correctly decided and is a binding authority.

In the last-mentioned case, following the decision in 13 *Moore's* Indian Appeals, pp. 333 and 339, it was held that an ancestral

(1) 9 Beng. L. R. 274. (2) Law Rep. 2 Ind. Ap. 263, 270.

estate, even though impartible, is not the separate or self-acquired estate of the single member upon whom it devolves, so long as the family continues joint.

In the argument before their Lordships some importance was attached by the learned counsel for the Respondents to the manner in which the Plaintiff's case was stated in the plaint, but their Lordships are of opinion that in dealing with the case they must look not to the mere wording of the plaint, but to the issue which was settled for trial, and to the manner in which the case was treated by the Lower Courts.

The following is the issue upon which the parties went to trial, viz., "Whether, according to the custom relied upon by the Plaintiff, and under the Hindu law, the Plaintiff has a right to succeed to the guddi, and whether the Plaintiff's character can in any way affect the suit or not." The plaint stated that "the ancient usage of the raj of *Bhara*, in common with other families of the Rajahs," was, "that upon the decease of a Rajah his nearest and eldest male heir succeeds him to the exclusion of the other male heirs, and the total exclusion of women," that is to say, that females were excluded by a male heir.

The Zillah Judge in dealing with the case, says:—

"Plaintiff alleges that the property in question is ancestral property belonging to a joint and undivided Hindu family governed by the law of the Mitakshara, of which he and the deceased Rajah *Mahander Singh* were members; that by virtue of a custom prevailing in the family, the estate of the Rajah of *Bhara* was impartible; that it was enjoyed by a single member of the family at a time, and devolved, on the death of the holder, on the eldest male heir; that *Mahander Singh*, the last holder, having died without male issue, he, the Plaintiff, being the eldest collateral male heir, was entitled to succeed to the estate, to the exclusion of the widow of *Mahander Singh*. The Defendant pleads,

"(1.) That the custom alleged by Plaintiff, whereby females are excluded from the succession, has no existence.

"(2.) That the Plaintiff and his nephew, the late Rajah *Mahander Singh*, were *separate in estate*, and were not

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members of a joint undivided Hindu family, and that, therefore, according to the ordinary rules of Hindu law, the Rani, Defendant, was entitled to succeed to the property of her deceased childless husband in preference to the Plaintiff."

He further says:—

"It is admitted on both sides that the estate is impartible, and is enjoyed by a single holder at a time. It is admitted that the mode of succession is governed by special custom. The dispute is as to what that special custom is."

Ultimately he arrived at the conclusion, first, that the Defendant had clearly made out that the Plaintiff's contention that widows never succeed to a raj is untrue; and secondly, that there was good evidence that in the family to which the possessors of the estate belonged, the custom was that the widow is not excluded by collaterals, and he therefore dismissed the suit with costs.

Upon appeal, the High Court affirmed the decision. The Chief Justice held that there was sufficient evidence of a custom by which the widow, failing direct descendants, was not excluded by collaterals. Mr. Justice *Pearson* agreed with the District Judge, and held, first, that the Plaintiff's contention that widows never succeed to a raj in that part of the country is untrue; and secondly, that there was good evidence that, in the family to which the possessors of the estate in question belonged, the custom was that the widow is not excluded by collaterals.

With reference to the findings of the Zillah Judge, and of Mr. Justice *Pearson*, that the contention of the Plaintiff that widows never succeed to a raj in that part of the country is untrue, their Lordships fail to find that the Plaintiff ever made an allegation to that effect. His allegation was that, according to the ancient usage of the Rajah of *Bhara*, male heirs succeeded to the exclusion of females. He, no doubt, in his plaint, used the words "according to the custom prevalent in respect of other estates," and also the words "in common with the other families of the Rajahs." The main allegation had reference to the usage of the

raj of *Bhara*, and was "that, after the decease of a Rajah, his nearest and eldest male heir succeeds him, to the exclusion of other male heirs and the total exclusion of women," and that allegation was true; for the raj of *Bhara*, from its earliest creation, had always descended to a male heir, and no female ever succeeded to it. The allegation made no distinction between lineal and collateral heirs, or between widows and other females.

It is not certain to what other estates or to what other Rajahs the Plaintiff referred when he added the words, "in common with the other families of the Rajahs;" whether he meant the Rajahs of the other estates which were formerly united with *Bhara* or not is not very important, he evidently referred to other estates and Rajahs similarly circumstanced, or in some way connected with the raj of *Bhara*, and not to every raj in that part of the country, whether the Rajah was separate or a member of a joint family, or whether the raj was ancestral or self-acquired. But, however this may be, it is clear that the issue did not impose upon the Plaintiff the necessity of proving that widows never, under any circumstances, succeeded to a raj in that part of the country.

The first part of the finding, therefore, is irrelevant, and the case must be decided with reference to the question whether the Mitakshara law of succession had been so far modified by custom, with respect to the ancestral raj of *Bhara*, as that failing lineal descendants of a deceased Rajah, his widow was entitled to succeed to the raj in preference to the Plaintiff, who was a collateral male heir and the eldest male member of the joint family. No such case ever occurred in respect of the raj of *Bhara*, and their Lordships are of opinion that there is no evidence to prove such a custom.

It was contended that a case had occurred in respect of the raj of *Ruh Ruh*, in which a widow had succeeded in preference to a male collateral.

The District Judge stated that the estate of *Bhara* was—

"One of five, all of which came from a common stock and had a common ancestor, the Rajah *Singandeo*, who lived 650 years ago."

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He proceeded,—

"The five were,—

"(1.) *Bhara* (the property in suit).

"(2.) *Jaggamanpur*.

"(3.) *Ruh Ruh*.

"(4.) *Kakhouto*.

"(5.) *Nakkatpatti*.

"The last family, *Nakkatpatti*, is extinct, and the second family, *Jaggamanpur*, has split up into the families of *Tarsor*, *Sorawan*, *Bhaddek*, *Hardoe*.

"It appears that no instance, as far as is known, has occurred in raj *Bhara*, where the Rajah has died sonless, until the present time.

"But instances of this have occurred in other branches of the common family which descended from Rajah *Singandeo*, and are adduced by Defendant in support of her allegation that the kul-rit, or family custom, and raj-rit, or custom of the raj, is as she alleges it to be.

"Thus, in the allied family termed raj *Ruh Ruh*, it is shewn that Raja *Kussul Singh* died, and was succeeded by his widows, Rani *Chandelin* and Rani *Bhadaurni*, although his younger brother, *Sambar Singh*, and the sons of *Sambar Singh*, were alive."

A similar statement is made by Mr. Justice *Pearson*, as to the origin of the five estates. He says:—"The estate in question is one of five which originally constituted a single property, and belonged to Rajah *Singandeo*, the common ancestor of the families which have since held them separately, a partition of them having been made between his five sons."

The fact of the formation of the five separate estates by the partition of one entire estate is not disputed, and it may be assumed, although not necessary to be decided, that there was such a connection between *Ruh Ruh* and *Bhara*, that evidence of a custom of descent in one of them would be admissible in support of a similar custom in the others. There is, however, no evidence except in one single instance in *Ruh Ruh* that a female ever held any one of the other four principal estates.

With respect to that exceptional case in *Ruh Ruh*, the district Judge held it to have been shewn that when Rajah *Kussul Singh* died he was succeeded by his widows *Rani Chandelin* and *Rani Bahadaurni* although his younger brother *Sambar Singh* and the sons of *Sambar Singh* were living.

Mr. Justice *Pearson* also treated the case as an instance of widows succeeding in preference to a niece's son, meaning probably the son of a nephew.

It appears, however, to their Lordships that it was not a case of succession by inheritance at all.

Rajah *Raghanath Singh*, a member of the *Ruh Ruh* family, and a great great grandson of the deceased Rajah *Kussul Singh*, was examined as a witness and stated that in his family women never sat on the guddi; that upon the death of his great grandfather *Kussul Singh*, *Himmanchal Singh*, his nephew's son, sat on the guddi, and after him *Khushul Singh*, who appears from the pedigree to have been the son and nephew of the deceased Rajah.

Mr. Justice *Pearson*, in dealing with the evidence of this witness, says:—

"The Plaintiff's witness, Rajah *Raghunath Singh*, the representative seemingly of the *Ruhruh* branch, avers generally that females are altogether excluded from succeeding to their husbands' estates by the custom of his raj. The only instance mentioned by him in support of his assertion is that his great grandfather, *Kussul Singh*, was succeeded by his niece's son, *Himmanchal*."

He should rather have said the son of his great nephew, *Ram Khaman Singh*.

He proceeds:—

"His statement on this point is opposed to the evidence of *Rao Jodha Singh*, of *Kakhouto*, of *Kuar Roshan Sing*, and of *Kalandar Singh*, witnesses on the other side, which is corroborated by two exhibits on the record, one being a copy of a proceeding of the Provincial Court at *Bareilly*, dated the 12th of April, 1813, and the other being a copy of a proceeding of the Civil Court of *Mainpuri*, dated the 12th of December, 1849. From the evidence indicated it appears that *Himmanchal's* claim to succeed to his grandfather was based on the allegation of his having been adopted by one or both of Rajah *Kussul Singh's* widows and was disallowed. The instance cited by Rajah *Raghanath Singh*, so far

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from proving the custom alleged by him, is really an instance of widows succeding in preference to a niece's son."

It appears from the record of the Provincial Court, referred to by the learned Judge, that *Rani Bhadaurin*, the widow of the deceased Rajah *Kussal*, who is supposed to have succeeded on his death, and who was one of the Defendants in an action at the suit of *Himmanchal*, was the junior widow, and that she in her answer admitted that, after the demise of *Kussul Singh* (he died in 1774), his estate fell under the management of the agents (karpadazan) therein named, and that a nankar allowance was assigned by the Government (which must have been the Native Government) to her and *Rani Chunder Bans*, the elder widow of the deceased Rajah; that in the year 1195=A.D. 1787, she caused the settlement of the estate to be made with *Himmanchal*, who kept the accounts, and became the proprietor; that in that year losses amounting to Rs.7300 occurred, which she paid to the Government, that her name, with that of *Sundun Singh*, having been entered in the decennial register, she in 1210 Fusli=about A.D. 1802 (which was shortly after the cession of *Etawah* to the *East India Company*) caused the settlement to be made with *Himmanchal Singh*, under the suretyship of *Sundun Singh*. She contended in her answer, that under that settlement *Himmanchal Singh* was one of her karindas, and that he having become insubordinate, she subsequently procured the second and third revenue settlements to be made with herself. *Himmanchal*, on the other hand, contended that he had been adopted by the elder widow as the son of the deceased Rajah, that the Defendant, *Bhadaurin*, the junior widow, had obtained the second and third revenue settlement by fraud in his absence, and he sued to recover possession. The litigation commenced in 1810, and it seems that the only issue raised between the parties was as to the validity of the alleged adoption. That issue was decided against *Himmanchal* by the Provincial Court upon the ground that *Rani Chunder Bans* had no authority from her husband to adopt, and on the 12th of April, 1813, it was ordered and decreed by that Court that *Himmanchal's* suit should be dismissed. The decision of the Provincial Court was, on appeal to the Sudder Court, affirmed on the 11th of August, 1817, and it was decreed that the property in dispute should, in right of succession, descend to

Koer Ghunshiam Singh as the proprietor thereof. Subsequently, on the 10th of August, 1818, it was ordered that possession be given to *Koer Ghunshiam Singh*, if he should enter into sufficient security for subscribing to the appeal to Her Majesty in Council. This he appears to have done, and the appeal was heard, and in 1834 the decree of the Sudder Court was affirmed by Her Majesty in Council, so far as it affirmed the decree of the Provincial Court of the 13th of April, 1813, and reversed so far as it decreed that the landed property should, in right of succession, descend to *Ghunshiam Singh* as proprietor thereof, and had the effect of declaring him entitled to be put into possession.

It is clear from the above statement that the widows did not succeed to the raj by inheritance, or to an impartible estate according to the rule of primogeniture, even if such a rule could be applicable to the case of two widows; on the contrary, it appears that upon the death of *Kussul* the estate was put under management of *Karpardazen* by the Native Government, and an allowance assigned not to the elder widow, but to the two widows jointly, probably as the guardians of *Himmanchal*, and that subsequently the revenue settlement was made with *Himmanchal*, and afterwards with the younger widow, *Bhadhaurin*.

It is not clearly shewn who obtained possession of the estate after the decree of Her Majesty in Council. Rajah *Raghanath Sing* stated that *Khushul Singh* sat on the guddi after *Himmanchal*. This, however, is not very material, as it is clear that both the widows died before 1834, and that no other female ever obtained possession of the estate. Rajah *Raghanath* must have been under a mistake when he stated that his grandfather's widow was living at the time when he gave his evidence.

It is rather remarkable that the District Judge, having found that the two widows succeeded upon the death of their husband (a finding in which Mr. Justice *Pearson* concurred), should have considered that a descent to the two widows jointly was evidence of a custom as to descent in *Bhara*, which he admitted to be an impartible raj held by only one member of the family at a time, and that one the eldest.

It was stated by *Koer Roshun Singh* that the elder widow succeeded to *Ruh Ruh* on the death of her husband, and the younger widow on the death of the elder, but that is quite contrary to the

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evidence, and to the findings of the District Judge and of Mr. Justice *Pearson.*

In the case of *Ramalakshmi Ammal* v. *Sivanantha* (1) it was said:—

"Their Lordships are fully sensible of the importance and justice of giving effect to long established usage in particular districts and families in *India,* but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further necessary that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Court can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

Their Lordships entirely concur in that doctrine, and they are clearly of opinion that there is not sufficient evidence that, even in the raj of *Ruh Ruh,* a custom existed by which a widow succeeded by inheritance to the estate of her husband in preference to collateral heirs on his dying without issue.

The contention of the Defendants was, that the Plaintiff and the late Rajah were separate, not that there was a custom for widows to inherit in preference to collaterals in the case of an undivided ancestral estate in a joint family; yet inferences were drawn in favour of such a custom by the District Judge and Mr. Justice *Pearson,* from descents to widows in the case of certain minor estates carved out of some of the five principal estates, such, for example, as *Tarsore*, *Sarawan, Salbad,* and *Mulhousie.* These estates, it was said, descended to widows, though collaterals must have been living. Three of these estates were granted for maintenance. Neither *Tarsore* nor *Sarawan* was a raj. *Mulhousie* was not impartible. No clear or satisfactory evidence was given that the estates were not separate estates of the last holders; whereas, if they were separate or self-acquired (which estates granted for maintenance probably would be), the widows would succeed, in due course of law, as in the *Shivagunga Case* (2) and the case of *Periasami* v. *Periasami* (3). In the only instance, as regards

(1) 14 Moore, Ind. Ap. 570. (2) 9 Moore, Ind. Ap. 539.
(3) Law Rep 5 Ind. Ap 61

Sarawan, in which a widow succeeded to a minor estate created out of the raj estate, her husband left a son, and upon a mutation the name of the son as well as that of the widow was entered. The case shews how easily witnesses may create a false impression when speaking generally of the succession of widows without shewing, and probably without knowing, the circumstances under which such successions took place. Other cases, such as one in *Mirzapore* and another in *Cawnpore*, were relied on, in respect of which no connection between them and *Bahra* was shewn to exist. Such cases, even if they could have any weight, were not admissible as evidence to prove a family custom in *Bhara*. (The *Marquis of Anglesey* v. *Lord Hatherton* (1)).

Upon the whole their Lordships are of opinion that the Plaintiff made out his case satisfactorily, viz., that the raj of *Bhara* was an ancient raj, and an ancestral estate, and that by virtue of an ancient custom in the family it was impartible, and to be held and enjoyed by only a single member at a time. His title then depended upon his legal right under the Mitakshara, and according to that law, the estate being ancestral, and the family undivided, he, as the nearest male heir of the deceased Rajah, and the surviving member of the undivided family, was entitled to succeed to the raj in preference to the widow. The Defendants did not prove their allegation that the Plaintiff and the deceased Rajah were separate, as alleged by them, and it was for them to prove, by clear and unambiguous evidence, that the law of succession, according to the Mitakshara, was modified by an ancient uniform custom in favour of a widow. This, in their Lordships' opinion, they failed to do. The result is that their Lordships will humbly advise Her Majesty to reverse the decrees of both the Lower Courts, and to order and decree that the Plaintiff do recover possession of the estate called raj *Bhara*, together with his costs in both the Lower Courts.

The Respondents must pay the costs of this appeal.

Solicitors for Appellant: *W. & A. Rankin Ford.*
Solicitor for Respondent the Collector: *H. Treasure.*
Solicitor for Respondent *Rani Baisni*: *T. L. Wilson.*

(1) 10 M. & W. 218.

J. C.*
1883
Dec. 5, 6.
1884
March 1.

RAI BISHEN CHAND . . . . . PLAINTIFF;

AND

MUSSUMAT ASMAIDA KOER . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT, NORTH-WEST PROVINCES.

Mitakshara Law—Gift to Grandchildren with Son's Consent—Gift to unborn Persons.

A deed of gift by a Hindu (Mitakshara) of his ancestral immoveable estate (the family being joint) in favour of the children of *U.* his only son, who consented thereto, was followed by mutation of names in favour of the only one of such children then born, under the guardianship of his mother. Both grandfather and grandchild died. In a suit by a judgment creditor of *U.* against the mother and heiress of the donee to avoid the said deed and to make the land comprised therein available to answer *U.'s* debts:—

Held, that the deed having been made on good consideration and in good faith was valid, whether or not *U.'s* creditors were unpaid:—

Held, further, that the deed, expressed to be in favour of children some of whom were unborn, was not on its true construction a gift to a class, void as to all, because inoperative as to some. If the donee's possible brothers are unable to take by virtue of the gift, the donee shall take the whole by virtue of the family arrangement, evidenced by the deed and acts done under the deed; in any event the property in suit effectually passed away from the grandfather and *U.*

APPEAL from a decree of the High Court (March 11, 1880) reversing a decree of the Subordinate Judge of *Benares* (June 28, 1879).

The suit was instituted on the 17th of February, 1879. Its nature, and the circumstances out of which it arose, appear in the judgment of their Lordships.

The material part of the judgment of the lower Court is as follows:—

"It is an admitted fact that the immoveable property in suit was the ancestral estate of *Mata Dyal Singh*. By the law of the Mitakshara, the Defendant *Udey Narain Singh*, his son, had his

* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

right in it from his very birth, and was the person who, after the death of his father, *Mata Dyal Singh*, would have had the sole proprietary right to it. Even while the latter was alive *Udey Narain Singh* had, under certain conditions, the right to have the property partitioned with him. Under the same law, *Mata Dyal Singh* had no right to transfer such ancestral property without the consent of his son, the Defendant *Udey Narain Singh*. The object of the gift made by *Mata Dyal Singh* to his minor grandson, *Satrujit Narain Singh*, the son of the Defendant *Udey Narain Singh*, is avowed in its deed to be to protect the estate from the consequences of the extravagance of *Udey Narain Singh*. This, in other words, is to save the estate from the demands of his creditors. This the Court holds to have been bad faith in the transfer made by gift. *Mata Dyal Singh* had no right to make the transfer without the consent of *Udey Narain Singh*. It is said the latter gave his consent to it. But such giving of consent while there was bad faith in the transfer, *i.e.*, to injure the creditors of *Udey Narain Singh*, had not the effect of rendering valid the gift. It is further said that in giving the consent *Udey Narain Singh* took Rs.5000 from his father and gave up all his rights in the estate, and then paid up some of his creditors with the said sum. But this payment of Rs.5000 to *Udey Narain Singh* does not save the gift from the taint of fraud. The debts, for which the Plaintiff obtained his aforesaid decree, dated the 26th of April, 1877, against the Defendant *Udey Narain Singh*, had been incurred in 1874, *i.e.*, before the execution of the disputed deed of gift. It is, the Court holds, a fraud against the Plaintiff that the Defendant *Udey Narain Singh* gave his consent, without which the transfer by gift could not have been effected, and gave up all his rights in the estate without discharging the whole debt due to the Plaintiff. It is admitted by the latter that in 1931 and 1932 Sambat he received Rs.900 from *Udey Narain Singh*, in payment of debt due to himself. It is alleged on the part of the lady Defendant that this sum was a part of the Rs.5000 received by *Udey Narain Singh* on the occasion of the execution of the deed of gift from his father, and it is accordingly pleaded that the act of the Plaintiff in taking the said sum of Rs.900 amounted to his accepting the validity of the said gift.

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But, as has been above observed, there is no reliable proof of the Plaintiff having had knowledge of the particulars of the gift before the year 1878. And if he received the said Rs.900 without such knowledge, that does not go to shew that he accepted the validity of the gift. There being, therefore, fraud in the gift, inasmuch as it was effected with the bad motive of preventing the creditors of *Udey Narain Singh* from realizing their demands from the estate in dispute, the Court holds the gift made to *Satrujit Narain Singh* to be invalid; and as a consequence, the right the Defendant *Mussumat Asmaida Koer* claims to the estate as the heiress of *Satrujit Narain Singh*, deceased, to be equally invalid. There are papers produced in this case to shew that, subsequently to the gift, affairs connected with the estate were carried on in the name of *Mussumat Asmaida Koer*, as guardian of the minor donee, *Satrujit Narain Singh*, and after the death of the latter in her name, as being the proprietor of the estate by right of inheritance to her minor son, deceased, and that she has all along been in possession of the estate. But this use of the lady Defendant's name in the affairs, while *Mata Dyal Singh* and *Udey Narain Singh* wished it, and all of them formed the members of a joint family, cannot but be considered to be nominal, and has not the effect of removing the taint of fraud from the gift. Therefore, by reason of the fraud, the Court holds *Mata Dyal Singh* to have been the actual proprietor of the estate in suit until his death, and after his decease, the Defendant *Udey Narain Singh*, his son and heir, to be his actual proprietor."

The High Court (*Spankie* and *Oldfield*, JJ.) were of opinion that "there are no reasons for holding that the gift was invalid and never operated, or for setting it aside at the instance of the Plaintiff. We will in the first place examine the deed of gift.

"*Mata Dyal Singh*, the executant, after declaring his own inability to look after the ancestral estate owing to infirmity and old age, and the unlikelihood that *Udey Narain Singh*, his son, would perpetuate his name and the reputation of the family, or provide for his minor son and others dependent on him, but on the contrary would dissipate the estate by his extravagance, and after declaring that he had several times paid his son's debts,

proceeds to convey the property detailed in the deed to *Satrujit Narain Singh*, the minor son of *Udey Narain Singh*, and his own brothers who are born or may be born hereafter, with the consent of his son *Udey Narain Singh*, and names *Asmaida Koer* to be the guardian of the minor and the manager of the estate.

"The deed then proceeds to declare that the profits of the lease of the *Tikari* estate are set aside for the support of *Udey Narain Singh*, and in the event of the lease terminating, the donee and his guardian under the deed of gift shall look after the support of *Udey Narain Singh*, and then comes this passage:—'*Babu Udey Narain Singh* will have no more right left to my ancestral property, because all his present and future rights to my inheritance have been sufficiently compensated by payment of his heavy debts, defrayal of his extravagant expenses on frequent occasions and recent payment of Rs.5000 on account of debts which he now states to be due by him, which I have been compelled to pay to release the property from every liability, and besides all this, by fixing an allowance for his personal expenses for present and future,' and *Udey Narain Singh* has affixed his signature to this deed and attested it in the following words:—'On the admission of the said *Babu* and with my own consent in autograph in Hindi.'

"If the gift was made under the circumstances stated in the deed and with the object stated, and really took effect by transfer of the property to the minor, the Plaintiff cannot have it set aside and defeat Appellant's right by inheritance from the donee, or claim to have the property conveyed by it sold in satisfaction of his decrees against *Udey Narain*.

"There was good consideration for the gift, since it was made with the object of preserving the family estate and securing provision for the minor and dependent members of the family, and we see no reason to doubt that it was *bonâ fide*, for proper and sufficient provision was at the time made for existing creditors. A sum of Rs.5000 was expressly set aside for creditors, and that sum was more than sufficient to cover the Plaintiff's claim at the time, and no evidence has been adduced to satisfy us that it did not cover all the existing debts due by *Udey Narain*: and besides the sum of Rs.5000, there would be assets in *Udey Narain's*

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hands, from the profits of the lease and personal property not affected by the gift.

"But there is another way of looking at the arrangement made by the deed: it may be said to effect a partition of the ancestral estate between *Mata Dyal* and his son *Udey Narain*, the latter having received Rs.5000 in money, which together with the sums which had been paid out of the property to liquidate his debts made up his share on partition; and *Mata Dyal* was quite at liberty to secure to himself in this way a proper share in the estate, and his dealing with such share cannot be questioned by the Plaintiff; and this character of the arrangement between *Mata Dyal* and *Udey Narain* is borne out by the passage in the deed already cited beginning "*Babu Udey Narain Singh* will have no right to my inheritance, &c."

"We see no reason to doubt that the gift was intended to take effect and that it did as a matter of fact take effect. The proper and necessary mutation of names in the revenue registers was at once effected, and in the name of *Satrujit Narain Singh;* and *Mussumat Asmaida* asserted her position as guardian and manager for the minor, *Satrujit Narain Singh*, obtaining a certificate under Act XXVII. of 1860, and she dealt with the estate in his name, and at his death she succeeded him as heir and had mutation of names made in her favour and dealt with the property in her own right. *Mata Dyal Narain* was an old and infirm man and died in two or three years after the execution of the deed, and he evidently had resolved to secure what remained of his estate for the provision of his grandson and other dependent members of his family by the gift in question, and there is no reason whatever to suppose that he did not honestly carry out his intention."

Leith, Q.C., and *C. W. Arathoon*, for the Appellant, contended that the evidence failed to shew any intention to change the ownership of this property. The Respondent did not produce satisfactory evidence that she was in actual *bonâ fide* receipt of rents and profits in pursuance of the deed of gift; or that the deed at the time was followed by any change of possession. It appears, from the evidence on the record, that the whole transac-

tion was a fraud upon *Udey Narain's* creditors, and that if *Udey Narain* consented to the transaction it was with that view.

Further, the family being undivided, the father could not voluntarily alienate the estate. Reference was made to *Sadabart Prasad Sahu* v. *Foolbash Koer* (1); *Deendyal Lal* v. *Jugdeep Narain Singh* (2); *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (3); There is no case which shews that a father could cede or surrender his share so as to give effect to that share being enjoyed by his son or grandson. [SIR BARNES PEACOCK:—If the infant took the whole estate, the unborn brothers would be shut out of the estate. SIR RICHARD COUCH:—It is a question whether the whole gift is not void as a gift to a class some members of which are unborn.] See *Soudaminey Dossee* v. *Joges Chunder Dutt* (4). In that case is a reference to *Srimati Bramamayi Dasi* v. *Joges Chunder Dutt* (5), and *Leake* v. *Robinson* (6). [SIR ARTHUR HOBHOUSE distinguished that case, adding that this is not a gift to a class as that was.] Act X. of 1865, sect. 102. Gifts made to persons unborn at the time are invalid; and as some of the class are unable to take, none can take: see Act X. of 1865, sects. 100, 101, 102, and other sections incorporated into Act XXI. of 1870. Besides, even if the grandson could take by this deed, the property would come to him liable for all the debts of his grandfather and father. Reference was also made to *Spirett* v. *Willows* (7).

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The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE:—

In this case the suit was brought by the Appellant against the Respondent and her husband *Udey Narain*, for the purpose of avoiding a deed of gift made in favour of the children of *Udey Narain*, and of making land comprised in that deed available to answer debts of *Udey Narain*.

Udey Narain belonged to a joint family living in the *Benares*

(1) 3 Beng. L. R. F. B. 31; S. C. 12 Suth. W. R. F. B. 1.
(2) Law Rep. 4 Ind. Ap. 247.
(3) Law Rep. 6 Ind. Ap. 88.
(4) Ind. L. R. 2 Calc. 269.
(5) 8 Beng. L. R. 400.
(6) 2 Mer. 363.
(7) 3 De G. J. & S. 293.

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district, and governed by the Mitakshara law. At the date of the transaction complained of *Mata Dyal* was the head of the family. *Udey Narain* was his only son, and he had by his wife *Asmaida* one son, named *Satrujit*, who was then between two and three years old. That appears to have been the whole of the family.

Udey Narain was then, and had for some time been, living a profligate life. He had left his wife and the family house, and was living with a prostitute in the city of *Benares*. He is stated to have been an extravagant man, running into debt, and wasting the family property in the pursuit of pleasure.

It was under these circumstances that the deed in question was executed. It bears date the 12th of January, 1875, and is in the form of a declaration by *Mata Dyal*. He recites that he is too old and infirm to attend to the management of the ancestral villages and the family, that *Satrujit* is an infant, that *Udey Narain* pays no attention to the family affairs, that he is frivolous, extravagant, and not likely to support his wife and children, and is placing the family reputation and property in jeopardy. The deed then proceeds as follows:—

"Therefore I have executed this deed of gift of my own accord and free will, and with the consent of *Babu Udey Narain Singh*, and I am getting the signature of the said *Babu* affixed to the margin of this document, so that he (*Babu Udey Narain Singh*) and his heirs may abide by the terms of this document. That *Babu Satrujit Narain Singh* minor himself and his own brothers who may be born hereafter, are and will be the permanent and rightful owners and claimants of all the ancestral properties, moveable and immoveable, my own property; that so long as the said donee does not attain the age of majority, *Mussumat Asmaida Koer*, the mother of the minors, should duly look after the support, education, and bringing up of the minor and manage the estate and the family affairs as a guardian of the said minor. That with a view to the completion of this document, I the executant will by filing applications in every department having jurisdiction in this matter get my name expunged, and will get the name of the minor under the guardianship of his mother entered in respect of all villages and land or portions of land

and houses, &c.; that the said guardian will in every way be competent to collect rents from the ilaka (estates), realize the outstanding debts, carry on banking transactions, manage all moveable and immoveable properties, and dismiss or employ servants, managers for collections, and Court mukhtars, just as she will think proper; that out of the profits which will accrue, after the payment of the Government revenue and defrayal of other necessary expenses, she will with all possible caution support, educate, and celebrate the marriage of the minor son and of other sons who may be born in future, and of the daughter, and keep the expenses on a moderate scale, and take every care, so that the ancestral property may not be mismanaged or charged with debt; that *Babu Udey Narain Singh* should defray his expenses from the profits arising from the lease of *Tikari* estate acquired by him, and he will have no connection with the ancestral property (and) my own property; that similarly the donee minor and his guardian will not have generally any right to demand the profits and products of the said ilakas under lease from *Babu Udey Narain Singh*, except whatever he (*Babu Udey Narain Singh*) may give of his own accord from the profits of the said ilaka under lease; that if, after the expiry of the term of the lease, a new lease be not granted to *Babu Udey Narain Singh* from the *Tikari* estate, the donee and the guardian should look after the support of *Babu Udey Narain Singh*; that besides this, *Babu Udey Narain Singh* will have no more right or title left to my ancestral property, because all his rights, present and future, to my inheritance have been sufficiently compensated by payment of his heavy debts, defrayal of his extravagant expenses on frequent occasions, and recent payment of Rs.5000 on account of debt which he now states to be due by him, which I have been compelled to pay to release the property from every liability, and besides all this, by fixing an allowance for his personal expenses for present and future."

Udey Narain acknowledged the deed under the head of "witnesses," but adding the words "with my own consent." He was therefore a party to his father's gift.

The deed was registered soon afterwards in the registry office

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of *Benares*, the Sub-Registrar recording that *Mata Dyal*, who was personally known to him, admitted its execution.

In the month of March, 1875, orders were made for the removal of the several mauzas comprised in the deed from the name of *Mata Dyal* into that of *Satrujit* minor under the guardianship of *Asmaida*. These orders were made on the reports of tahsildars that *Satrujit* by his guardian was in possession.

On the 28th of August, 1875, *Satrujit* died. *Asmaida* then claimed as his heir to have the estates transferred into her own name, and as after notices issued no one objected, orders were made to that effect. She also procured a certificate entitling her as a representative of *Satrujit* to realize about Rs.544 outstanding debt due to him, and certain promissory notes and bank shares which were his property. It does not appear that these properties were ancestral, but it is not suggested that the infant had any other property.

On the 21st of April, 1878, *Mata Dyal* died. The Plaintiff was a creditor of *Udey Narain* by virtue of two bonds given in February and March, 1874, for an aggregate sum of Rs.3000. He had obtained a decree on these bonds against *Udey Narain* on the 26th of April, 1877, for the sum of Rs.5111. On the death of *Mata Dyal* the Plaintiff took steps to enforce his decree against the family property, and on the 26th of July, 1878, he attached it, with other property, and advertised it for sale as the property of *Udey Narain*.

Asmaida then intervened as an objector to the sale, and on the 4th of November, 1878, the Subordinate Judge of *Benares* allowed her objection, and directed that the family property should be released from attachment. In his judgment he states that *Asmaida* has, as guardian to *Satrujit* and in her own right, been in possession, and that "her possession up to this day is proved from papers that are extant."

The creditor thereupon brought the present suit, alleging that the deed of January, 1875, was executed merely to defeat the right of the creditors, and was only a paper and fraudulent proceeding; and further that it was illegal as being a gift to unborn persons.

The Defendant *Asmaida* put in a written statement, which was

verified by *Bindu Lal* her agent. In it she alleged the profligacy and extravagance of *Udey Narain;* that he had on several occasions incurred illegal debts, which *Mata Dyal* was compelled to pay in order to maintain his reputation; and that he had consented to the deed of gift after receiving Rs.5000, which was considered to be the value of his proper share in the property according to his future title.

The Subordinate Judge decided in favour of the Plaintiff. He took the view that *Udey Narain's* consent, without which *Mata Dyal* could not alienate the ancestral property, was a fraud on *Udey Narain's* creditors, and that the deed of gift was wholly void.

Asmaida appealed to the High Court, who reversed the decree and dismissed the suit. That Court considered that the deed was made on good consideration, in good faith, and with a proper provision, not shewn to be insufficient, for *Udey Narain's* creditors. They further thought that the transaction might in some sense be considered as a partition, meaning apparently that *Udey Narain* had received the value of his share, and had in effect been bought out of the ancestral property.

The transaction has been attacked at the bar on several grounds.

First, it is said that the evidence of change of possession after the execution of the deed is insufficient to shew that the parties considered the ownership to be changed. But there are two answers to this argument. In the first place it proves too much. If it is worth anything, it proves that the deed was a pure bènami transaction, which their Lordships consider to be an inadmissible conclusion. They think it impossible to say that, as between *Udey Nardin* or *Mata Dyal* and the others, it was intended to have no effect. The second answer is, that, though the evidence of ostensible change of possession seems meagre, there is some, which the Courts below have thought sufficient to prove the fact, though the Subordinate Judge thinks that it is of no validity because tainted by fraud. The Subordinate Judge says:—

"There are papers produced in this case to shew that, subsequently to the gift, affairs connected with the estate were

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carried on in the name of *Musumat Asmaida Koer*, as guardian of the minor donee *Satrujit Narain Singh*, and after the death of the latter in her name, as being the proprietor of the estate by right of inheritance to her minor son deceased, and that she has all along been in possession of the estate. But this use of the lady Defendant's name in the affairs, while *Mata Dyal Singh* and *Udey Narain Singh* wished it, and all of them formed the members of a joint family, cannot but be considered to be nominal, and has not the effect of removing the taint of fraud from the gift."

And the High Court says:—

"We see no reason to doubt that the gift was intended to take effect, and that it did as a matter of fact take effect. The proper and necessary mutation of names in the revenue registers was at once effected, and in the name of *Satrujit Narain Singh*; and *Mussumat Asmaida* asserted her position as guardian and manager for the minor *Satrujit Narain Singh*, obtaining a certificate under Act XXVII. of 1860, and she dealt with the estate in his name, and at his death she succeeded him as heir, and had mutation of names made in her favour, and dealt with the property in her own right."

It may be added that in the execution proceeding, where the question was who actually had possession, the then Subordinate Judge decided in favour of *Asmaida*.

The second point made at the bar was that which forms the main discussion below, viz., that the transaction was a fraud upon creditors. On this point their Lordships concur with the High Court. That it was intended to save the ancestral property from being wasted by the vices and extravagance of *Udey Narain* is openly avowed on the face of the deed. But such an intention is not fraudulent. It may be carried into effect by honest means. And people who mean to effect such a design by fraud are not likely to put it in the forefront of an instrument which must be registered, which may easily be discovered by persons interested to inquire about the property, and to which attention is likely to be drawn by the consequent mutation of names after public notice and a change of management.

If the statements in the deed are true, it is clear that *Udey Narain* received a substantial consideration for his consent, not only because the ancestral estate was secured for his son, but because his debts had been paid by *Mata Dyal* in the past, and were now being provided for to the extent of Rs.5000. It is urged that there is no evidence of the payment of this Rs.5000, and it is true that *Asmaida* was not called as a witness, that *Bindu Lal* her agent who verified her statement was not called, and that the witnesses who speak to the payment speak without much particularity, and do not distinguish between the amount, if any, paid to *Udey Narain* himself and the amount paid directly to his creditors. But it is difficult to suppose that there was any dispute on the point in the Courts below. No special allegation is made about it in the plaint, though the Plaintiff then knew the precise contents of the deed. No separate issue is framed upon it. Besides the written statement, three witnesses speak of *Udey Narain* "taking" Rs.5000. Two of them had attested the deed; and two of them had been employed in carrying portions of the Rs.5000, Rs.900 in all, to the Plaintiff himself. All three are cross-examined, but their statements as to the payment are not challenged or tested in any way. The Subordinate Judge treats the payment as one of the facts in the case, though he holds that it cannot save the gift from the taint of fraud. The High Court treat it as one of the facts in this case, and to a great extent found their judgment upon it. Neither Court discusses the proof of it, or intimates that there was any dispute or doubt raised upon it. It would be a dangerous thing for this Board to allow a conclusion so formed to be brought into doubt, merely because the evidence of it in the record may not be so good as would be required if the matter had been directly disputed.

It is suggested that the Rs.5000 came from the joint chest; that it was an inadequate consideration for the interest which *Udey Narain* was giving up; and that he was left insolvent. But the Plaintiff, who now wishes us to draw these conclusions, has laid no adequate ground for them in his allegations or in his evidence. Such as the evidence is, it seems probable that the Rs.5000 (to say nothing of prior payments on *Udey Narain's*

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account) was very nearly, if not quite, the value of his share, which on a partition would have been one fourth of the estate. According to the Plaintiff's own valuation of the estate, Rs.5000 exceeded the value of that fourth. Even if it came from the joint chest, it is an application by the head and manager of the family of a large share of the family property to the separate purpose of one member, who was indulging his inclinations apart from the family. That is a substantial consideration. There is no proof that *Udey Narain* was left insolvent, nor any reason to think that he was. It does not clearly appear that he owed anything except to the Plaintiff, whose debt at the date of the transaction was reduced to about Rs.2400. And it does clearly appear that *Udey Narain* had other property. He had the *Tikari* lease, mentioned in the deed of January, 1875. And he had a property called mouzah *Sarai Nandan*, which has been taken by the Plaintiff in execution. It may indeed be that he had only one immoveable property, called by two names; but if such things are left in doubt, it is the Plaintiff's fault for not raising issues upon them.

Indeed the Plaintiff's case has been framed and argued as though the creditors had got some charge on *Udey Narain's* share in the family property, and as if it were for the Defendant to shew purchase for value without notice, in order to retain that property. But all the Defendant has to shew is that the transfer was made in good faith and for good consideration. The document in fact shews valuable consideration approaching, if not equalling, the whole value of *Udey Narain's* then share. And, though *Mata Dyal* seems to have taken the precaution to see that portions of the Rs.5000 actually reached the hands of *Udey Narain's* creditors, he was not bound to do that, because they were general creditors, and had no lien upon the property. It would place these joint families in a very unfortunate predicament if they could never buy out a vicious member who threatens their ruin, so long as any one of his creditors remains unpaid.

There remains a question of some difficulty, whether the deed, which contemplates benefits to afterborn sons of *Udey Narain* as well as to *Satrujit*, can have any operation in his favour. This

question, though raised in the plaint, is not dealt with by either of the Lower Courts. It depends entirely on the view which may be taken of the meaning of the parties to the transaction, for the rule of law on which the Plaintiff relies, viz., that gifts cannot be made to persons unborn at the time, is well settled.

It is said then that the gift is made to a class, and that, inasmuch as some of the class are unable to take, none can take, and certain sections of the *Indian Succession Act* of 1875 are invoked to give weight to this contention, the Legislature having thought fit to apply those sections to Hindu wills.

Independently, however, of the distinction which may be taken between wills the operation of which is suspended during the testator's life, and deeds which operate immediately, especially such deeds as confer a present interest upon a present person, the sections cited have no bearing on such a gift as that under consideration. Sect. 102 lays down the rule that a bequest inoperative as to some of a class shall be wholly void, not in all cases, but only when the bequest offends against the rules contained in sects. 100 and 101. And the gift under consideration does not fall within either of those two sections. It may be that illustration (*b*) to sect. 102 imports into *India* an English rule of construction which usually defeats the intention of the testator. But whatever force the illustration may have (and it seems out of place as attached to a section intended, not to define the word "class," but only to establish a special incident of gifts to classes), it is not made applicable beyond the two cases contemplated by sects. 100 and 101.

Assuming that the deed is intended to express a gift to the brothers of *Satrujit* which cannot take effect as such, what is the whole scheme of the parties? We find them bent on saving the ancestral estate from the consequences of the continued extravagance of one of its members. The plan they adopt, probably the only plan open to them except a complete partition, is a transfer by the head of the family, with the consent of his son, to the lower generation. The only member of that generation was the grandson *Satrujit*. He therefore is made to take by name and immediately, and the possession and ownership are transferred to him. Is then the gift indisputably designed for him wholly to

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fail because the parties supposed that they could join with him possible after-born sons, who, if any had happened to be born, could not legally claim under a gift? Is *Udey Narain*, whose interests were bought out for valuable consideration, to re-enter upon his son, in whose favour they were bought out? No doubt that, on the present assumption, some portion of the intention must fail, but that is no reason why the whole should fail. The paramount intention was to get rid of *Udey Narain* by passing the property to his sons. That intention is much more readily effectuated by giving the property to *Satrujit*, the only then son of *Udey Narain*, than by holding that the deed and all that followed upon it, the mutation of names, the possession and management of *Asmaida*, did not operate any change at all.

Cases are not rare in which a Court of construction, finding that the whole plan of a donor of property cannot be carried into effect, will yet give effect to part of it rather than hold that it shall fail entirely. In the present case, there is every reason for holding that, if *Satrujit's* possible brothers are not able to take by virtue of the gift, he shall take the whole. He is there present, and able to receive the gift. He is an individual designated in the deed. If the deed stood alone, it is a question in each case whether a designated person who is coupled with a class described in general terms is merged into that class or not. But the deed does not stand alone. It is followed by actions of a kind which, even without a deed, may work a transfer of property in *India*. *Satrujit* is entered in the Collector's books as the sole possessor of the property, and his guardian takes possession, first in his name, and afterwards as his successor. Their Lordships hold that the circumstance that the parties wished to do something beyond their legal power, and that they have used unskilful language in the deed of gift, ought not to invalidate that important part of their plan which is consistent with one construction of the deed, and is clearly proved from the transfer of the property in fact.

But their Lordships conceive that it is not necessary to view this transaction as though it were to be determined by rules of construction drawn from English law and applicable to English deeds of gift. The High Court viewed it in the light of a

partition. It cannot be strictly a partition, for, according to the Mitakshara (cap. i., sect. 5, verse 3), there can be no partition directly between grandfather and grandson while the father is alive. But it is a family arrangement, partaking so far of the nature of a partition that *Udey Narain* receives a portion and is thenceforth totally excluded, and *quoad ultra Mata Dyal* surrenders his interest to his grandson, who on a complete partition among the whole family would be entitled to one-fourth.

Now in such an arrangement it would be quite consistent with Hindu ideas of ancestral property to express a desire that the whole generation into which the property was transferred should benefit by it. Indeed in the case of a partition between father and sons it is laid down in the books that if a son born after the partition of ancestral estate does not out of the residue of his father's estate get a share equal to what his brothers had obtained, the other brothers must contribute to a share out of their portions. This rule is to be found in the Dayabhaga, cap. vii., ss. 10, 11, and 12, which is a Bengal authority, but it refers to Vishnu and Yajnyavalkya authorities on which the Mitakshara is founded. Indeed, the principle of the joint family is not less closely, but more closely, insisted on by the *Benares* school than by the *Bengal* school of law. But their Lordships are not now affirming the law on this point, nor are they deciding or prejudicing any question which may arise between *Satrujit's* heirs on the one hand, and his brothers, if any should be born, on the other. They are only shewing that the notions present to the mind of the head of a joint Hindu family who is making a family arrangement, are something very different from the notions present to the mind of an English testator when he makes a gift to a class.

It is curious that in the appeal which was argued immediately before this (*Hurdey Narain* v. *Rooder Perkash* (1)), there was a similar gift made from a similar motive. *Shib Perkash* and his infant son *Rooder* constituted the whole of a joint family living under the Mitakshara law. *Shib* was extravagant and embarrassed, and to save the ancestral estate he executed a deed of

(1) See *ante*, p. 26.

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gift to *Rooder*, coupled with a declaration that if any other sons should be born to him they should from the date of their birth acquire equal right in the property. It did not occur to anybody to contend that the deed was void, except as a fraud upon creditors. The High Court, consisting of *Mitter* and *Tottenham*, JJ., say:—

"But conceding that the gift is void against the father's creditors, it is binding and operative as between the parties to the instrument. Therefore from the moment of its execution *Shib Perkash* ceased to have any joint interest in the family estate."

The appeal turned on other questions, and their Lordships only refer to the case as illustrating the notions present to the minds of Hindus when making arrangements of ancestral property.

The result is that, in whatever light the transaction may be viewed, and whatever questions may arise between those who claim under it, the property effectually passed away from *Mata Dyal* and from *Udey Narain*. The Appellant's claim fails; his appeal must be dismissed, and their Lordships will humbly so advise Her Majesty.

Solicitor for Appellant: *T. L. Wilson.*

BANI RAM AND ANOTHER . . . . . APPELLANTS ;

AND

NANHU MAL . . . . . RESPONDENT.

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June 24, 25.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Final Order in Execution Proceedings—Procedure—Jurisdiction—Power of Appellate Court.

A Judge having decided in the course of execution proceedings that a decree according to its true construction provided for interest on the decretal money at twelve annas per cent. after as well as before the expiration of two years from the date thereof, and such decision not having been appealed from :—

Held, that the High Court could not at a later stage of the execution proceedings set aside such order and disallow interest after the said two years had expired.

Ram Kirpal Shukul v. *Musumat Rap Kuari* (1) followed.

APPEAL from a decree of the High Court (Jan. 10, 1881), reversing a decree of the Subordinate Judge of *Aligarh* (Aug. 18, 1880).

The question in dispute was as to the construction of a decree of the Subordinate Judge of *Aligarh*, dated the 7th of May, 1875, which had been passed to embody the terms of a compromise come to between the father of the Appellants, since deceased, on the one hand and *Mitter Sen*, the father of the Respondent, since deceased, and the Respondent on the other, and as to what rate and for what period interest was payable under the said decree upon a proper construction of the same.

The facts are stated in the judgment of their Lordships.

Whitehorne, Q.C., and *W. A. Raikes*, for the Appellants, contended that the questions as to rate of interest and the period for which it was payable had been previously determined by a

* *Present* :—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) *Ante*, p. 37.

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competent Court, that is by the Subordinate Judge, on the 25th of January, 1879. If there had been any valid objection to that decision it could and ought to have been appealed from. No appeal having been made the order became final and bound the parties. There was no jurisdiction in the High Court to set it aside and re-adjudicate a point already conclusively determined in the suit. Reference was made to *Peareth* v. *Marriott* (1); *Ramput Kirpal* v. *Mussumat Rup Kuari* (2).

They were stopped by their Lordships.

Popham, for the Respondent.

Counsel for the Appellants were not called on to reply.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The question in this appeal arises in the execution of a decree of the Court of the Subordinate Judge of *Aligarh*, dated the 7th of May, 1875. It was on a compromise, the claim in the suit being to recover Rs.60,000 principal and Rs.14,715 interest. The decree was in these terms: "That a decree for a fixed sum of Rs.78,700, as due up to the 4th of May, 1875, be given to the Plaintiff against the two Defendants under the terms of the compromise; that this sum be paid by the Defendants in two years, with interest at 12 annas per cent. per mensem." The claim was upon a bond of the 10th of July, 1875, which stipulated for interest at 12 annas per cent. Execution proceedings appear to have been taken upon this decree, but the actual application for the execution is not on the record. It would appear, however, that some villages were sold on the 20th of December, 1877, and were purchased by the decree holder; and a petition was presented by the judgment debtors on the 20th of April, 1878, in which it was said that they were willing to pay interest according to accounts.

On the 17th of May, 1878, they presented another petition, in

(1) 22 Ch. D. 191. (2) *Ante*, p. 37.

which the statement was made that the decree holder should not get the interest which he then claimed, the question apparently being as to the interest beyond the two years. On the 30th of August, 1878, the question between the parties was more distinctly raised. Then, in a petition of the judgment debtors, it was stated that the Plaintiff had filed an application for execution of the decree in the sum of Rs.38,000 on the 6th of August, 1878, "and charged interest at 12 annas per cent. after the lapse of the term of two years, contrary to the terms of the decree. Prior to this, on the 18th of July, 1878, an objection was filed regarding the same, which was rejected without due consideration. The petitioner therefore prays that an order, after inquiry, may be passed for deducting the excessive interest which the decree holder had charged contrary to the terms of the decree." On this it was ordered that the case should be brought forward for decision on the 1st of November, 1878. It appears from the list of papers that have not been forwarded with the record that the case was twice adjourned, and on the 25th of January, 1879, an order was made in these terms:—"In my opinion the objection is not tenable. The decree of the Court of the Subordinate Judge, dated the 7th of May, 1875, clearly provides that under the terms of the compromise a decree for the payment of a fixed sum of Rs.78,800 be made in favour of the Plaintiff against both the Defendants as due up to the 4th of May, 1875, and that Defendants should pay the amount with interest at 12 annas per cent. per mensem. Hence the plea of the Defendants cannot in any way be held to be a reasonable one." Then it states what the plea of the Defendant was:—"That if the said amount had been paid within two years the interest would have been paid to the decree holder, and that the interest on the decree money could not be recovered after the expiry of the term fixed for payment." Looking at the dates which have been given, it seems clear that this order must have been made in the execution proceedings in which the petition of the 30th August, 1878, had been presented. It is an order by the Judge deciding against the objection which had been made by the judgment debtor, that the decree money could not be recovered after the expiry of the two years. The

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next step appears to have been an application for the execution of this decree on the 5th of December, 1879, in which an account was made up claiming the interest at the rate of the 12 per cent. up to the time of the execution; and upon that the Judge made this order. As to the first objection,—which is stated at page 10, and which was this: "The judgment debtor has the following objections to the whole of the demand made under the decree: (1) From the date of the decree the decree holder cannot under any circumstances get more than eight annas per cent. interest on the decree money according to law, especially when the decree does not provide for any interest after two years, nor has any rate been fixed in it,"—the Judge says: "The Court is of opinion that the decree holder would get the same interest on the decretal money which has been awarded to him in the Court's decision in the regular suit. It is 12 annas per cent. In the Execution Department the Court cannot, contrary to the decision in the regular suit, reduce the rate of interest from 12 annas per cent. to 8 annas per cent. in any way. The objector's statement, that the decree does not provide any rate of interest subsequent to two years, is altogether wrong. The two years' period in the decree is for the payment of the judgment debt, not for the payment of interest at 12 annas per cent." Then comes this: "Before this also this very objection had been raised on behalf of the objector, and rejected by the Court on the 25th of January, 1879. No appeal has been preferred from that order." From that decision there was an appeal to the High Court, which says in its judgment: "It was urged before us that the decree holder is not entitled to any interest after the expiry of two years from the date of the decree; and this seems to us to be the case. The decree is for a sum of Rs.78,700 only. The decretal order proceeds to direct that this sum shall be paid in two years, with interest at 12 annas per cent. per mensem, but there is no order as to payment of interest after two years." The High Court took no notice of the ground upon which the Subordinate Judge decided,—that the question had been concluded by his order of the 25th of January, 1879; and their Lordships think it should be remarked, in justice to the High Court, that this may be

accounted for by the fact that not long before this the full Bench of that Court had held that the law, which they call the law of *res judicata*, was not applicable to execution proceedings. The question now for their Lordships' decision is, whether the order of the 25th of January, 1879 was not conclusive between these parties? It was an order made in the execution proceedings in this very suit; and the decision of this Board in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari* (1) is exactly in point. The only question that could be raised, and was raised by the learned counsel for the Respondent, was that there might be some difficulty as to the construction to be put upon the words of the order of the 25th of January, 1879. But looking at the terms of that order, although it may not be so clearly expressed as it might have been, there appears to be no doubt that what was decided on that occasion was the same right to recover the interest, after the expiration of the two years which was fixed by the decree for payment, as is now put in question in the present execution proceedings.

Under these circumstances their Lordships will humbly advise Her Majesty that the order of the High Court be reversed; and the Respondent will pay the costs of this appeal, and also pay the costs of the proceedings in the High Court.

Solicitors for the Appellant: *Oehme & Summerhays.*
Solicitors for the Respondents: *Wilkinson & Sons.*

(1) *Ante*, p. 37.

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July 3, 12.

MADHO PERSHAD . . . . . PLAINTIFF;

AND

GAJADHAR AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Mortgage—Notice of Foreclosure—Regulation XVII. of 1806, sect. 8—Conditions precedent.

In foreclosure proceedings under Regulation XVII. of 1806, the provisions of sect. 8 must be strictly observed. They are not merely directory, but prescribe conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor.

Norender Narain Singh v. *Dwarka Lal Mundur and Others* (1) followed.

An admission in the pleadings that some notice of foreclosure had been received, coupled with an omission to raise any issue as to its validity, does not preclude a defendant from questioning such validity in appeal.

Where it appeared that the notification served upon the Defendant was not a perwannah under the seal and official signature of the Judge, did not notify from what date the year of redemption began to run, and was not and did not purport to be a copy of the petition for foreclosure:—

Held, that the requirements of sect. 8 had not been complied with, and that the Plaintiff's suit for proprietary possession as upon the completion of foreclosure proceedings, must be dismissed.

APPEAL from a decree of the Judicial Commissioner (March 15, 1881), reversing a decree of the District Judge of *Lucknow* (Sept. 8, 1880), and dismissing the Appellant's suit with costs.

The suit was brought on the 30th of March, 1880, to recover after foreclosure possession of a mouzah, *Bhadin*, in the district of *Unao*, which had been mortgaged by the Respondents or their predecessors in estate to the deceased father of the Appellant, Rajah *Behari Lal*, by a registered mortgage dated May 3, 1863, and payable five years after date.

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) Law Rep. 5 Ind. Ap. 18.

The foreclosure proceedings were commenced by applications under Regulation XVII. of 1806, to the Court of the Deputy Commissioner of *Unao*, in accordance with which notices were issued by that Court to the mortgagors on the 19th of December, 1876; and the year of grace having expired twelve months after that date, without payment made by the Defendants, the Plaintiff contended that his rights became absolute.

The Defendants by their written statement admitted the execution of the mortgage, and raised no contention as to any irregularity in the foreclosure proceedings; but alleged, as their sole defence, that the consideration stated by the mortgage to have been paid had not really passed, and that it was executed upon a promise made to them by a brother of the mortgagee, one *Balgobind*, and an agent of his, one *Maha Sukht Dichit*, that the latter would conduct and defray the expenses of an appeal to Her Majesty in Council then expected to be preferred in a suit in which the Respondents were interested, but that, as the appeal in question was never preferred, no expenses were incurred.

The facts, issues, and proceedings, are stated in the judgment of their Lordships.

The material part of the judgment of the Judicial Commissioner was as follows:—

"Differing then from the Court of first instance, I find on the first issue, that consideration was not received by Defendants-Appellants.

"And, if I had arrived at an opposite conclusion, I should still have dismissed this suit in its present form, on the ground that the notice of foreclosure had not been duly served, according to sect. 8, Regulation XVII. of 1806, and the proceedings were therefore irregular and invalid. Although the perwannah of the 26th of April, 1876, purports to issue by order of Deputy Commissioner, it certainly does not bear his official signature, there was no copy of the written application for foreclosure served with it at the same time; nor does it notify that, if the mortgagor shall not redeem the property mortgaged in the manner provided for in the foregoing section of the Act within one year from the date of the notification, the mortgage will be finally foreclosed and the conditional sale will become conclusive.

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"What it does do is simply to order them to appear by the 18th of May to take away notice-deeds in the matter of *Madho Parshad's* notice of foreclosure of mouzah *Bhadin* for Rs.12,365-6, on conditional deed of sale.

"It is urged that their subsequent petition, objecting to foreclosure, proves that they were aware of the claim to foreclose the amount claimed, and the amount was to be paid by them within one year; but this is not so. What it proves is that they were aware that Petitioner had claimed all this, but that is a very different matter to an authoritative notice by the Judge that such was the law. It is further urged that this objection was not taken in the Court of first instance, and so must be held to be waived, but I cannot concur. The provisions of sect. 8 of Regulation XVII. of 1806, are imperative, and not merely directory. In *Bank of Hindostan* v. *Shoroshibala Debee* (1) a formal notice was served, and the mortgagors must have been well aware of the legal results of such notice, for they had once gone through the whole foreclosure proceedings of the same mortgage. Although the proceedings were subsequently cancelled, yet there being no proof of service at the same time of copy of the written application for foreclosure, this was held to be fatal to the Plaintiff's claim to foreclose. And in my opinion the tendency of all cases is to shew that, whether parties raise it or not, it is imperative on the Judge to try and decide the issue, whether notice of foreclosure had been duly served or not. Foreclosure being an act which puts an end to the right of the mortgagor, it must be carried out strictly in accordance with the Regulation. The right to foreclose rests upon such notice as the law requires to be given, and though it may be hard on the claimant that he should suffer from the laches of the Court, yet it is eminently his duty to see that everything is done in conformity with law, and it would be much harder if the mortgagors were to lose their estate for non-conformance with a notice which in no important respect was conformable with the law."

Doyne, for the Appellant, contended, that no objection having been taken to the insufficiency of the notice of foreclosure, and

(1) 2 Ind. Law Rep. (Cal.) 311.

no issue having been raised upon it, the Appellate Court ought not to have entertained it. Otherwise, that the notice proved to have been given, was, under all the circumstances, a sufficient compliance with the provisions of sect. 8 of Regulation XVII. of 1806, and was so understood and accepted by the Respondents.

The Respondents did not appear.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This is an appeal from a judgment of the Judicial Commissioner of *Oudh*, reversing a judgment of the District Judge of *Lucknow*.

The Plaintiff, a banker, sued to recover proprietary possession of a village on the completion of foreclosure proceedings with respect to a mortgage of it. The mortgage was dated the 3rd of May, 1863, seventeen years before the commencement of the suit; of the mortgagors, seventeen in number, eleven survived, the remaining Defendants being representatives of those who had died. The mortgagee was Rajah *Behari Lal*, the father of the Plaintiff. The deed of mortgage purports to be a security for the repayment within five years of Rs.4851, with 12 per cent. interest, the receipt of which sum is acknowledged, and it declares that if the principal and interest are not repaid within five years the instrument shall operate as an absolute deed of sale.

The principal sum is stated to be made up of debts due by the mortgagors, or otherwise secured by former mortgages, which they were to be provided with money to pay, of a balance due to the bank, and an advance of Rs. 1356 "for necessary expenses."

The Plaintiff alleged default in the payment of the mortgage money, that the proper proceedings for foreclosure had been taken, and claimed possession of the land.

The Defendants denied that any consideration was given for the bond, and alleged that it was given only to secure advances which might be made to pay the costs to which the Plaintiff might be put by the prosecution of an appeal by two persons

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who had brought a suit against them, and failed in the Lower Court; that no appeal was preferred, and that nothing was advanced.

The issues stated were:—

(1.) Did the Defendants receive no consideration?

(2.) Were the Defendants induced to execute the deed by fraud and misrepresentation?

On the part of the Plaintiff the mortgage was duly proved, which undoubtedly threw upon the Defendants the burden of proving absence of consideration.

The Plaintiff further called witnesses to the actual payment of the consideration money when the mortgage was executed. He put in the former mortgages. He shewed an entry in his books whereby it appeared that the sums due on the former mortgages were either advanced to the Defendants or paid for them; that they owed the balance to the bank stated in the mortgage deed, and received the amount stated to have been paid to them. Against this evidence the Defendants called two witnesses who swore that they were present on the examination of the deeds, and that no money passed, but none of the mortgagors, of whom eleven were living, were called to prove want of consideration, the pendency of the litigation, to meet the possible cost of which they alleged the mortgage to have been given, or indeed any part of their case, which involved a charge of gross fraud against the bankers. The District Judge believed the evidence of the Plaintiff, and gave judgment in his favour.

This judgment was reversed by the Judicial Commissioner on two grounds:—1st, that the mortgage was without consideration; 2nd, that the proper proceedings had not been taken to effect foreclosure.

The finding of the Judicial Commissioner on the first point seems to have been mainly based on three considerations:—

1. That the entries in the books of the Plaintiff contradict his story. Their Lordships have already intimated that in their view these entries confirm it.

2. That the money was said to be advanced before the deed was registered. It is to be observed here that the transaction occurred in 1863, a year before the Registration Act of 1864

came into force, which, for the first time, provided that payment of the consideration of deeds might be made in the presence of the Registrar at the time of registration and recorded by him; a practice which has since become common. As the banker was not a party to the deed, his presence before the Registrar was not necessary, while that of the Defendants was. If there is some force in the observation that it is strange that he should after parting with his money have entrusted the deed to the Defendants to have it registered and receive it back from the Registrar, on the other hand it is to be observed that the deed must at some time have been returned to the banker, as he produced it at the trial.

3. The absence of any demand of interest from the time of the the mortgage money being due to the date of the suit, nearly twelve years, an observation certainly of some weight.

On the whole, however, their Lordships are of opinion that the evidence preponderates on the side of some consideration having been received by the Defendants, though how much was actually advanced to them in cash may admit of doubt.

The second ground on which the Judicial Commissioner reversed the judgment of the District Judge presents a question of more difficulty. It was contended on the part of the Appellant that inasmuch as the Defendants had in the Court below rested their case solely on the absence of consideration for the mortgage, and had admitted in their written statement that they received some notice of foreclosure, and no issue as to the validity of the foreclosure had been raised in the Court of the District Judge, the Defendants were precluded from questioning the regularity of the foreclosure proceedings before the Judicial Commissioner, although they took the point in their grounds of appeal; and that the Commissioner had no power to inquire into those proceedings.

The proceedings necessary to effect foreclosure are thus prescribed in sect. 8 of Regulation XVII. of 1806:—

"Whenever the receiver or holder of a deed of mortgage and conditional sale may be desirous of foreclosing the mortgage, and rendering the sale conclusive on the expiration of the stipulated

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period, at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition, to be presented by himself or by one of the authorized vakeels of the Court to the Judge of the zillah or city in which the mortgaged land or other property may be situated. The Judge, on receiving such written application, shall cause the mortgagor or his legal representative to be furnished as soon as possible with a copy of it, and shall at the same time notify to him by a perwannah, under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive."

These provisions are not merely directory but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and have for their object to protect mortgagors, who are often (as in the present case) poor and ignorant men, from fraud and oppression on the part of money lenders. Accordingly, both in the Courts of *India* and by this Board, it has been held that the prescribed procedure must be strictly observed. In the case of *Norender Narain Singh* v. *Dwarka Lal Mundur and Others* (1) it was held that the finding of the zillah Judge, in the foreclosure proceedings, that notice had been duly given to the mortgagors, was not even *primâ facie* evidence of the regulation having been complied with, and that the service of the petition for foreclosure and the perwannah of the Judge in the form directed by the regulation must be strictly proved. To construe the pleadings in the District Court as a binding admission that the Respondents had received due notice, according to the Regulation of 1806, in the foreclosure proceedings, would be to apply to pleadings in *India* a stricter construction than is usual.

The Judicial Commissioner had the subject brought before him by the grounds of appeal; he had power to take additional

(1) Law Rep 5 Ind. Ap. 18.

evidence, or to frame a new issue, which it is to be presumed that he would have done had it been necessary, and had the parties desired it. In their Lordships' judgment he had, at the least, a discretion to inquire into the subject if he thought fit, and they are not prepared to say that he exercised that discretion so wrongly that his judgment ought to be reversed.

Although the vakeel for the mortgagors appeared before the Judicial Commissioner, argued the question of foreclosure, and adduced evidence upon it, it does not appear that any application was made for the settlement of an issue on this question, nor was it suggested, nor is it now suggested, that further evidence of the regularity of the foreclosure proceedings was obtainable.

The question remains whether, in the foreclosure proceedings, the provisions of the Regulation of 1806, with respect to the notification to be made to the mortgagor, were or were not duly observed.

Several documents were put in, of which the following is a specimen:—

"Translation of Notice to *Ishri*, dated 30th of March, 1876.

"(Signed) *H. B. H.*

"*Madho Parshad*, son of *Raja Beharilal, Bahadur, Sahukar* (banker), and talukdar of *Maurawan*, &c. Plaintiff.

versus

"1. *Gajadhar*, 2. *Jagan*, 3. *Matadin*, son of *Thakur*, 4. *Ishri*, son of *Dhaukal*; 5, *Janki*, son of *Jewrakhan*; 6. *Lalta*, 7. *Badloo*, and 8. *Bhagwandin*, sons of *Maduri*; 9. *Sheo Charan*, 10. *Gauri*, 11. *Janki*, and 12. *Mathura*, sons of *Pem*, 13. *Kusuhar*, son of *Baji*; 14. *Kalidin*, 15, *Rajwa*, and 16. *Sheo Singh*, sons of *Badri*, 17. *Sankata*, Minor, son of *Ram Sahai*, under the guardianship of his mother, and 18, *Bala*, son of *Bhawanidin*, Brahmins, residents, and co-sharers of mouzah *Bhadin*, *Pargana* and *Tahsil Purwa*, in the district of *Unao*, mortgagors . . . Defendants.

"Claim.—Foreclosure of mortgage of the entire village *Bhadin*

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in the *Pargana* and *Tahsil Purwa*, in the *Unao* district, under the terms of the deed of mortgage by conditional sale dated the 3rd of May, 1863, A.D. for an amount noted below :—

"Notice.

"To *Ishri*, son of *Dhaukal*, caste Brahmin, resident and sharer of mouzah *Bhadin*.

"Whereas Plaintiff has filed in the Court an application for foreclosure of mortgage in respect of village *Bhadin* described in the deed of mortgage by conditional sale dated the 3rd of May, 1863, owing to non-performance of the conditions entered therein, notice of one year's currency is hereby given to you, as laid down in sect. 8, Regulation XVII. of 1806, that if you will not pay up the mortgage money with interest within twelve months and redeem the mortgaged property, the mortgagee shall, at the expiration of the period stipulated for, become in virtue of the condition as regards non-receipt of the mortgage money and interest the absolute proprietor of the said village, and no objection whatever will thereafter be attended to.

	R	A.	P.
"Principal mortgage money	4,851	0	0
Interest	6,932	4	0
Future interest for one year	582	2	0
Costs	8	4	0
Total . . . . Rs.	12,373	10	0

"Dated the 30th of March, 1876.

"In Hindi.

"(Signed) *Ishri*, Lumberdar, with pen of *Gauri*, Patwari. Witnessed by *Gauri*, Patwari."

H. B. H. are said to be the initials of the District Judge.

The signature at the bottom is said to represent the receipt of the document by *Ishri*, one of the Defendants, but when and where he received it is not very certain.

The following is a sample of another set of notices, dated the 26th of April, 1876 :—

"By Order of the Deputy Commissioner of *Unao*.

"Notice of Foreclosure of Mortgage.

"No. 59. Miscellaneous, Civil.

"*Madho Pershad*, son of *Raja Behari Lal, Bahadur*, banker, and talukdar of *Maurawan*, &c. . . Plaintiff.

versus

"*Gajadhar*, &c. (eighteen persons), residents of mouzah *Bhadin, Pargana* and *Tahsil Purwa* . Defendants.

"Claim.—Foreclosure of mortgage by conditional sale of the entire village *Bhadin* in lieu of Rs.12,365.6 in all.

"Notice to *Sheo Charan*, Defendant.

"Whereas the Plaintiff named above has put in a petition in this Court, requesting that a notice of foreclosure of mortgage be issued to you, you are therefore directed to attend this Court, on the 18th of May of the current year, and take away the aforesaid notices, filed by the Plaintiff after understanding their full purport; consider this urgent.

"Dated this 26th day of April, 1876, A.D.

"(L.S.) (Signed) "

It would appear by this that the Defendants are summoned to attend the Court on the 18th of May, in order to receive a notice of foreclosure, and that consequently they had not received notice before.

Accordingly on the 18th of May they attend he Court.

The proceedings before the Court are headed:—

"Claim to foreclosure of mortgage of village *Bhadin* in lieu of Rs.12,366.6. Application for the issue of notice of foreclosure for the term of one year."

The Defendants objected to receiving the notice on the ground of want of consideration for the mortgage.

A minute of the Court of the Deputy Commissioner, dated the 10th of December, 1876, is in these terms:—

"Parties are present, *i.e.*, the Defendants, who were sent for, have appeared in person, while the Plaintiff's pleader is present for him; notice has been delivered.

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It has been contended that on that day at least the notices were delivered to the Defendants, and that on that occasion they signed their names as having received them.

But what did they receive? The document of the 30th of March; none other is suggested, unless it be the document of the 26th of April, which is less favourable to the Plaintiff.

This document of the 30th of March, however, is not a compliance with the Regulation. It is not a perwannah under the seal and official signature of the Judge; it does not notify from what date the year during which redemption shall be made begins to run, and it neither was nor purports to be a copy of the petition for foreclosure, the furnishing which to the mortgagor is declared by this Board in the case before cited to be essential. Their Lordships are therefore of opinion that the Judicial Commissioner was right in holding that the requirements of the Regulation had not been complied with, and they will humbly advise Her Majesty that his judgment be affirmed.

Solicitor for the Appellant: *T. L. Wilson.*

PARTAB NARAIN SINGH . . . . . DEFENDANT;

AND

TRILOKINATH SINGH . . . . . PLAINTIFF.

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June 28; *July* 1, 2, 23.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Hindu Law—Suit against Hindu Widow as representing her Husband's Estate —Res Judicata—Oudh Talukdars' Relief Act, 1870, *sect.* 25.

Where by the terms of her husband's will a Hindu widow is the full representative of his estate; *held*, that a decree against her declaring that the will was revoked, and that the Appellant was entitled to succeed *ab intestato*, bound the Respondent whose claim was by appointment from the widow under the will, whether or not he was a party to the suit in which the decree was made.

Quære, whether the Respondent who had been as a minor made a party and personally served with a summons in the original suit, and who, having attained his majority and as transferee of the estate from the widow, prosecuted the appeal to Her Majesty in Council, should be deemed a party thereto and bound as a party by the final order of Her Majesty in Council.

Where a manager has been appointed under the *Oudh Talukdars' Relief Act*, *held*, that sect. 25 does not render a judgment in a suit relating to succession void, as between the parties contesting the right to succession, merely because the manager has not been made a party to the suit.

APPEAL from a decree of the Judicial Commissioner (July 22, 1882) reversing a decree of the District Judge of *Fyzabad* (August 29, 1881), which had dismissed the Respondent's suit with costs.

The object of the suit was, in effect, to have declared the Plaintiff's title to succeed to the estates of Maharajah *Man Singh*, deceased, talookdar of *Oudh*, as appointee under a power given by the will of *Man Singh*, dated the 22nd of April, 1864, to his Maharani *Subhao Kooer*, to nominate a successor, which power she exercised in the Plaintiff's favour, on the 16th of August, 1872: and the Plaintiff prayed for a declaration that he was not bound by the judgment (1) of the Judicial Committee, dated the

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR ARTHUR HOBHOUSE.

(1) See Law Rep. 4 Ind. Ap. 228.

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19th of July, 1877, and the consequent order of Her Majesty in Council.

The effect of their Lordships' judgment was to reverse the concurrent judgments of the Indian Courts, and to declare that the will of *Man Singh*, above referred to, had been duly revoked by him in his lifetime, such revocation having been effected by certain oral instructions given by the testator in January, 1870, to Mr. *Carnegy*, then the Commissioner of *Fyzabad*, and that the present Appellant was entitled to succeed, as *ab intestato*, to the talukdari estate of *Man Singh*, as his heir.

An application was made in May, 1878, by the Respondent, to have that suit reheard as against him, or a declaration made that he was not bound by the order of Her Majesty in Council made therein, on the grounds that he was not properly made a party to that suit, and that his interest in the estates in suit was not properly represented.

In dismissing the application (1) their Lordships intimated that the allegations made in this Respondent's petition, viz., that his brother *Luchmi Nath* was not his guardian, and that no guardian *ad litem* had been appointed, and that this Respondent was never properly represented in the suit, were matters which could be properly decided only in a suit instituted in *India* and upon fresh evidence.

This suit was, consequently, instituted in the Court of the Additional District Judge of *Fyzabad*.

Both Courts held that the proceedings in the former suit were in no way binding on the Respondent. The first Court, however, dismissed it on the merits; while the Judicial Commissioner gave a decree declaring that the will of *Man Singh* was not revoked and did not become inoperative in his lifetime, and that the Respondent was by virtue of the appointment made thereunder by the said Maharani the successor of the deceased Maharajah, and absolutely entitled to his estates.

The facts appear in their Lordships' judgment in the former case and hereinafter.

Leith, Q.C., and *Graham*, Q.C. (*Woodroffe* with them), for the

(1) See Law Rep. 5 Ind. Ap. 171.

Appellant, referred to the former proceedings, and contended that the Respondent was bound by them. His name was on the record, and the evidence shewed that he was duly served and knew of the proceedings, and took part in them and actively defended his interests. Further than that he claimed derivatively under the will, and would have been bound by the decree against the widow as representing her husband's estate, even if he had not been a party. The widow according to the true construction of the will represented her husband's estate until she appointed a successor, as completely and effectually as a childless widow represents her deceased intestate husband. Reference was made to the *Shivagunga Case* (1); *Aumirtolall Bose* v. *Rajoneekant Mitter* (2); *Nobinchunder Chuckerbutty* v. *Issurchunder Chuckerbutty* (3). The appointment made in favour of the Respondent was revocable and in the nature of a will. The Maharani did not purport to divest herself of her estate under her husband's will; and, therefore, even if that will had been unrevoked, the Respondent took no estate as transferee from the widow, who continued to represent the estate. As to any further deed, viz., that in 1875, it was after the former suit had commenced, and does not affect any question in this appeal.

The Attorney-General (Sir *H. James*), and *Cowie*, Q.C. (*Doyne Mayne* and *Howard* with them), for the Respondent, contended that he was a necessary party to the former proceedings if he were to be bound thereby, that he was not in fact a party, and therefore he was not bound. The Respondent claimed title derivatively under the will of *Man Singh*, assuming it to be unrevoked. Whether he was bound by a decree against the widow, depended upon whether all contingent or collateral interests were adequately represented by her. That of course depends upon their respective interests in the estate, whether *Trilokinath* claimed through her or adversely to her. It was then contended that the will gave an authority coupled with an interest, that the instrument of 1872 operated as a present

(1) 9 Moore, Ind. Ap. 604. (2) Law Rep. 2 Ind. Ap. 121.
(3) 9 Suth. W. R. 505.

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irrevocable appointment in pursuance of the will, the deed of 1875 being rejected as inconsistent therewith. The course adopted was a particular mode of giving an estate in remainder, the appointee under the deed of 1872 getting a vested estate in remainder. The widow had only a life interest beneficially, and a decree against her could not affect those who have a right to say that they are entitled in remainder by virtue derivatively of *Man Singh's* will. The Respondent had a vested interest distinct from hers and in no way dependent upon it. Reference was made to *Jarman* on Wills, p. 143; *Duke of Marlborough* v. *Lord Godolphin* (1). Again, the former suit was not merely defective by reason of *Trilokinath* not being a party thereto. The estate was under the operation of the *Oudh Talookdars' Relief Act*, 1870, and the manager appointed thereunder was, by virtue of sect. 25, a necessary party.

Leith, Q.C., replied.

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The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This appeal arises in a suit brought by the Respondent in which he sought a declaration that he was entitled to succeed to the large talook of *Mahdona*, in *Oudh*, and other property which belonged to the late talookdar, Maharajah Sir *Man Singh*. The District Judge of *Fyzabad* dismissed the suit, but on appeal, the officiating Judicial Commissioner reversed his decree, sustained the Respondent's suit, and made the declaration he prayed. This declaration is directly opposed to the declaration made by the Queen in Council on the report of this Board in a former suit brought by the present Appellant, in which substantially the same issues relating to the succession to the talook as those arising in the present suit were raised and decided.

The first question to be considered, therefore, in the present appeal is, whether the Respondent is bound by the judgment in the former suit, for, if so bound, the question on the merits need not be discussed.

(1) 2 Ves. Sen. 61.

It has scarcely been denied that the cardinal issues which were decided in the former suit are identical with those raised in the present; and the principal dispute arising on the defence of *res judicata* has been, whether the Respondent is bound either as party or privy to that former suit.

The facts relating to the succession are fully stated in the judgment of this Board in the former appeal (1). But it will be convenient for the elucidation of the question of *res judicata*, to which their Lordships' observations will be confined, to re-state some of these facts.

The late Maharajah was one of the great landholders of *Oudh*, whose status and rights are the subject of Act I. of 1869. He died on the 11th of October, 1870, leaving a widow, the Maharanee *Subhao Kooer*, a daughter by a deceased wife, and a grandson (the Appellant), son of that daughter. He also left two brothers surviving him, both having sons; one of these brothers, *Raghubar Singh*, being the father of *Lachmi Nath*, and of *Triloki Nath* (the Respondent), the latter being the younger.

Some years before the passing of Act I. of 1869, viz., on the 22nd of April, 1864, the Maharajah executed a will, and deposited it with the Commissioner of the district. This will (using the translation given in the judgment of the officiating Judicial Commissioner, which was adopted at the Bar), is in these terms:—

"In the name of the mighty Lord *Ganesh*.

"I am Maharajah *Man Singh* Bahadur, Kaim Jang, talukdar of raj *Shahganj*, raj *Gonda*, and other places.

"Whereas my intention as regards making any boy representative has not yet become fixed, I therefore, for the present, declare my aforesaid Maharani representative, and proprietor, of my estate, and property, moveable and immoveable; until she make some one representative, let her remain representative, like myself, without power to aliene; and as regards my property, moveable and immoveable, no sharer or partner has any claim. Therefore, having written these few words of the nature of a will, I have deposited with the Government, that it may remain a record, and be of use in time of need."

(1) Law Rep. 4 Ind. Ap. 228.

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About two years after the Maharajah's death, and on the 16th of August, 1872, the Maharanee executed a document, of which the following (also taken from the above-mentioned judgment) is a translation :—

"I am Maharani *Subhao Kunwar*, widow of Sir Maharajah *Man Singh*, Sahib Bahadur, Kaim Jang, K.C.S.I., Talukdar of the raj of *Mahdona*, *Gonda*, &c.

"Whereas the late Maharajah *Sahib Bahadur*, my husband, departed this life on the 11th of October, 1870, corresponding with Katik Badi, 2nd, Sambat, 1927; and from that time up to date I am, under the will executed by my husband on the 22nd of April, 1864, in proprietary possession of the entire raj and estates, and of the property, moveable and immoveable, of the Maharajah, my husband; and whereas life is uncertain, and after my death disputes may arise with regard to the succession to the raj and dignity of the late Maharajah my husband, it is therefore right that I should make a will regarding the appointment of an heir and representative, after myself, in place of the Maharajah, now in heaven, my husband.

"I, therefore, being in good health, and of sound mind, have, of my own entire free will, and under no pressure or compulsion, appointed the youth *Triloki Nath*, son of Rajah *Raghubar Sing*, Sahib, deceased, nephew of my husband, heir and representative in place of my husband, of all the rights and dignities conferred on the Maharajah Sahib *Bahadur*, now in heaven, by the British Government, and of the entire estate, and all property, moveable and immoveable. The said youth shall, after my death, remain, from generation to generation, in the enjoyment of all the rights and dignities, in place of the Maharajah *Sahib Bahadur*, now in heaven; and the said youth will also own, and enjoy, the property belonging to me, moveable and immoveable. I will fix such maintenance as I may think fit for the youth *Partab Narain Singh*, and for *Darogah Sham Dhar*. These allowances shall continue to be paid by the said youth, and by his successors, for ever, after my death; and the said youth, and his successors, shall also discharge any money debts, or verbal contracts, binding on me, or on the estate. I have, therefore, written these few

words of the nature of a will, that after my death they may be of use when required."

At the time the former suit was commenced, viz., on the 7th of November, 1872, the Respondent's title, if any, rested entirely on these documents, for as the younger son of a living brother of the late Maharajah he was not entitled to succeed to the talook as heir.

The claim of the Appellant, the son of a daughter of the Maharajah, rested on a clause inserted, at the instance of the Maharajah himself, in Act I. of 1869, providing that, in default of a son or son's descendants talooks should descend to such son, if any, of a daughter of the talookdar, "as has been treated by him in all respects as his own son." (Sect. 22, clause 4.)

The former suit was brought by the Appellant, against (1) the Maharanee (2) the Respondent, alleged to be represented by *Lachmi Nath*, his brother and guardian, (3) *Darogha Sham Dhar*, brother of the Maharanee, (4) *Lachmi Nath*. The Appellant, in his plaint, asserted his title to succeed to the talook as heir, by virtue of Act I. of 1869, being, as he alleged, a daughter's son, who had been treated by the Maharajah as a son, and prayed that the above-mentioned documents of the 22nd of April, 1864, and the 16th of August, 1872, be cancelled.

This plaint is very general and informal, but it appears from the judgment of the Deputy Commissioner of *Fyzabad* that (in his own words) "the pleadings gave rise to the following issues, which, as amended at the suit of the parties, ultimately stood thus." The 1st, 2nd, and 4th are as follows:—

(1.) Did the Maharajah leave a will, and if so what was the effect of it?

(2.) Did he ever direct the destruction of the will?

(4.) Was Plaintiff ever adopted as a son by the Maharajah, or treated by him as his own son?

Evidence having been given on these issues both the Courts in *Oudh* decided that the Maharajah had left a will, and had not revoked it, and thereupon dismissed the suit of the Appellant.

The Appellant appealed from these decisions to Her Majesty in Council, and obtained their reversal.

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In the judgment of their Lordships the questions for decision are thus stated:—

"It is now admitted, if it were ever seriously doubted, that the Appellant can only succeed in his suit by establishing both the following propositions:—

"1. That the testamentary disposition which the Maharajah had undoubtedly power to make, and did make in 1864, was revoked or became inoperative in his lifetime.

"2. That the Appellant is entitled to succeed to the talook as the son of a daughter of the Maharajah, who had been treated by him in all respects as his own son, within the meaning of the 4th clause of sect. 22 of Act I. of 1869."

After careful consideration of the evidence bearing on these propositions, this Board came to the conclusion that the Appellant had established both; the result being, that the affirmance of the first destroyed the foundation of the Respondent's title, which rested on the Maharajah's will, whilst the affirmance of the second established the right of the Appellant to succeed to the talook as heir. This Board therefore advised Her Majesty to reverse the decree appealed from, and to declare that the will of the Maharajah was duly revoked by him in his lifetime, and that the Appellant was entitled, under Act I. of 1869, to succeed, as *ab intestato*, to the talookdaree estate of the late Maharajah. A declaration to this effect was accordingly made by Her Majesty in Council.

On the 3rd of January, 1879, the present suit was brought by the Respondent, raising the same issue upon the revocation of the will as that stated in the judgment of this Board and decided against him, the fourth prayer in the present plaint being that it may be declared that the will of the Maharajah was not revoked, but was a good and valid will at his death.

The Respondent contends that he is not bound by this judgment, because he was a minor when the former suit was commenced, and *Lachmi Nath*, who is represented on the record to be his guardian, was not duly appointed.

It appears that the Respondent was of the age of sixteen years and ten months when the former suit was commenced, and

did not attain his legal majority, which in *Oudh* is the age of eighteen, until the 7th of February, 1874, after both the judgments in *Oudh* had been given. This is not disputed by the Appellant, nor is it contended that *Lachmi Nath* was properly appointed as guardian *ad litem*. But it is insisted that the Respondent is bound by the judgment in the former suit in two ways.—

1st. By having, with knowledge that he was nominally a party to the suit, taken upon himself the prosecution of the appeal to the Queen in Council, not only after he had become of full age, but after the talook had been actually transferred to him by the Maharanee, by an instrument to be presently adverted to, and so had waived the defect of a due appointment of guardian, or was estopped from setting it up.

2nd. That, if he be not bound as a party to the suit, the Maharanee fully represented the estate in the previous litigation, and consequently that the judgment in the former suit against her binds the Respondent.

With reference to the first of these points, which was that first argued at the Bar, their Lordships at once intimate that they do not propose to discuss it at length, as their decision will not turn upon it. But to complete the history of the former suit, and to shew the position of the parties when the present was commenced, it will be necessary to refer shortly to some further acts and proceedings. Evidence was given in the present suit that the Respondent was personally served with the original summons in the former one, and that from time to time he was present with the legal advisers for the defence when the case was discussed; but as all these things took place whilst he was still a minor, they are only material to shew his knowledge of the earlier proceedings when he prosecuted the appeal to Her Majesty in Council.

After the Appellant had obtained leave in the former suit to appeal here in that suit, and during the pendency of that appeal, the Maharanee, on the 20th of May, 1875, transferred by deed the full ownership and immediate possession of the talook to the Respondent, who, at the same time, executed a counter deed pledging himself to obey her as a son, and to carry on the business of the estate according to her advice. The Respondent

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having thus become the owner of the talook, as far as the Maharanee could make him so, appears upon the evidence to have corresponded with Mr. *Wilson*, the solicitor engaged in the appeal, upon the conduct of it, and to have supplied funds for its prosecution. Although it seems that no formal appearance was entered for him, his name appears in some of the proceedings as a party to the suit. Whether in thus carrying on the appeal he should be deemed a party to it, and bound as a party by the final order of the Queen in Council, their Lordships, as already intimated, do not think it necessary to decide. It may here, however, be observed, that although after the transfer of ownership of the talook had been made to him, *pendente lite*, by the Maharanee, he carried on the appeal in the manner just mentioned, he did not think fit to bring that transfer to the notice of this Board until the Order in Council had been issued, and upon his application for a rehearing.

Their Lordships now proceed to consider the second question, viz., whether the Maharanee fully represented the estate in the former suit, which mainly depends on the construction and effect to be given to the will of the Maharajah, and to the first instrument executed by the Maharanee.

There can be no doubt that the will of the Maharajah is a testamentary instrument. According to the translation of it before set out, he states, as a reason for making it, that his intention as regards making any boy representative had not become fixed. "Therefore, for the present," obviously pointing by this expression to the possibility of his making another disposition before his death, he declared the Maharanee "representative and proprietor of my estate; until she make some one representative, let her remain representative, like myself, without power to aliene." This language in its natural meaning plainly discloses an intention to vest the whole estate in the Maharanee, until she should divest herself of it "by making some one else representative," and the words are sufficient and apt words to accomplish this intention.

As if to leave no doubt of his wish to make his widow proprietor of the talook, until by her own act she appointed another, the Maharajah adds that until she does so she is to remain

representative "like myself;" the plain meaning of these words being that until such appointment she was to own and represent the estate as fully as he himself owned and represented it.

It is not necessary to consider whether the prohibition against alienation was or was not an effectual restraint; for, however that may be, it is clear that this provision would not prevent the vesting of the whole estate in the Maharanee.

In what manner the succession would have gone, under this peculiar will, if the Maharanee had died without appointing a representative to the estate is a question which does not now arise. It is sufficient for the present purpose to hold that, until she had appointed another to be owner and representative, the Maharanee's estate in the talook was sufficient to constitute her the full representative of it in the former suit. Her estate was at least as large as that of a Hindu widow in her husband's property. What was said by this Board of the widow's estate in the *Shivagunga Case* is applicable to hers: "The whole estate would, for the time, be vested in her absolutely for some purposes, though in some respects, for a qualified interest, and until her death it could not be ascertained who would be entitled to succeed; .... it is obvious there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow." (1)

The Officiating Judicial Commissioner did not disaffirm the proposition that, assuming no appointment had been made by the Maharanee, she would have fully represented the estate. He rests his judgment on the ground, "that with reference to the conditions of the Maharajah's will, the Maharanee divested her estate by the execution of the document of 1872, and the Maharajah's estate became, so far as it could then become, *in bonis* of the nominated successor." This is the principal ground on which his decree was sought to be supported in the arguments at the Bar. It was contended for the Respondent that the document of 1872 was a present irrevocable appointment; whilst the contention for the Appellant was that it was a will taking effect

(1) See 9 Moore, Ind. Ap. 604.

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only on the death of the Maharanee, and ambulatory and revocable in her lifetime.

Their Lordships are of opinion that the latter is the true nature of the document. It commences with a recital of the will of the Maharajah styling it "a will." The Maharanee then says that life is uncertain, and that after her death disputes might arise as to the succession to the raj, and proceeds, "It is therefore right that I should make a will regarding the appointment of an heir and representative, after myself, in the place of the Maharajah; I, therefore, being of good health and sound mind, have appointed the youth, *Triloki Nath*, nephew of my husband, heir and representative." She proceeds to say that the youth will enjoy the property after her death. She also bequeaths to him her own property. She says she will fix allowances for maintenance to relatives, which are to be paid after her death by *Triloki Nath*, who is also to pay her debts. She concludes by saying she has written these few words "in the nature of a will," that after her death they may be of use.

The document, both in its beginning and its end, is expressly styled a will. In the beginning, it is so styled after reference to the Maharajah's "will," and an instrument of the same nature as his was evidently contemplated. It is also plainly declared by the Maharanee that *Triloki Nath* was to become representative only after her death, and there is no indication whatever that she intended to divest herself of her husband's property during her lifetime, any more than of her own, which she also bequeaths.

It is to be observed that, when the Maharanee sent a copy of the document to the Superintendent of the Court of Wards to inform him that she proposed the Respondent to be successor of the Maharajah after her death, she calls it "a will."

It was argued that the document was evidence that she had made an immediate appointment, because the words "I have appointed" are used. There is no pretence for saying that she had appointed the Respondent otherwise than by the instrument itself. These words therefore can only have operation according to the nature of the instrument. They are not in themselves inconsistent with a disposition by will, and are altogether

insufficient to countervail the express description of the document as a will, and its general tenor.

It was but faintly contended that the Maharanee had no power to make the appointment of a successor to the talook by will, and therefore, to give effect to the instrument of 1872, it must be construed as a present appointment. But it would be impossible to give effect to the instrument contrary to the intention of its author. Treating it then as a will, which their Lordships hold it to be, the Respondent took no estate by virtue of it; and, of course, if the Maharanee had no power to appoint by will, he never could have taken any. The estate therefore, assuming the Maharajah's will had been unrevoked, would have remained in the Maharanee until the execution of the deed of the 22nd of May, 1875, which, being made *pendente lite*, cannot affect the present question.

An objection to the efficacy of the judgment in the former suit was made during the argument, on the ground that the manager of the estate, appointed under *The Oudh Talookdars' Relief Act* (XXIV. of 1870), had not been made a party to it.

On the 4th of December, 1870, the Maharanee presented a petition under the above-mentioned Act, which, after stating that she had succeeded to the estate of her husband, prayed that the estate might be placed under the management of the Government; and, on the 3rd of June, 1871, an order was made by the Officiating Chief Commissioner appointing the Deputy Commissioner of *Fyzabad* to be manager.

The objection was rested on the 25th section of the above-mentioned Act, which is as follows:—"Nothing in this Act precludes the Courts of the province of *Oudh* having jurisdiction in suits relating to the succession to, or the rights of persons claiming maintenance from, any immoveable property brought under the operation of this Act, from entertaining and disposing of such suits; but to all such suits the manager of such property shall be made a party."

It appears that in settling the issues in the present suit, the District Judge was asked to frame an issue raising this point. The Judge declined to do so, and the point apparently dropped

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out of the suit. However that may be, their Lordships think the omission to join the manager as a party does not affect the validity of the decree as between the Appellant and the Respondent. The appointment of the manager did not vest the estate in him. It remained in the Maharanee as before. Nothing in the previous part of the Act takes away the jurisdiction of the Courts in suits relating to succession, and the 25th section expressly declares that it is not taken away. The Defendants to the suit might have objected to the non-joinder of the manager, or the manager might have intervened under the provision at the end of the section, but the section does not enact or purport to enact that jndgments given in such suits shall be void as between the parties contesting the right to succession.

In the result, their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and to order that the suit of the Respondent be dismissed, and that he do pay the costs in the Courts below. The Respondent must also pay the costs of this appeal.

Solicitors for Appellant: *Watkins & Lattey.*
Solicitors for Respondent: *Barrow & Rogers.*

RAJA AJIT SINGH . . . . . PLAINTIFF;

AND

RAJA BIJAI BAHADUR SINGH AND RANI JANKI KUNWAR . . . . . DEFENDANTS.

J. C.*

1884

June 20, 21, 24.

(CONSOLIDATED APPEALS AND CROSS APPEALS.)

ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.

Fraud—Deeds of Sale and Hypothecation—Collusion between Grantor's Manager and the Lender—Conditions of Cancelment.

Where deeds of hypothecation and sale are ordered to be set aside on the ground of collusion between the grantor's manager and the lender, *held*, that the condition of cancelling the deeds should be, not the repayment of moneys proved to have been received by the manager, but of sums shewn to have been actually paid to the grantor personally, or borrowed by the manager in the course of a prudent management of the estate.

FOUR consolidated appeals and cross-appeals preferred in two suits instituted in the Court of the District Judge of *Rae Bareli*, in the province of *Oudh*, and tried together, of which the first was instituted by *Raja Ajit Singh* on the 23rd of January, 1880, and the second, in the nature of a cross-suit, was instituted by *Raja Bijai Bahadur Singh* and his wife, *Rani Janki Kunwar*, on the 9th of April, 1880.

The judgments of the First Court, which were in both suits in modification of the relief prayed, were dated respectively the 31st of May, 1881, and were, with the exception of a slight variation in the decree made in the second suit, confirmed on appeal and cross-appeal by the Judicial Commissioner of *Oudh* on the 17th of January, 1882.

The facts and proceedings are stated in the judgment of their Lordships.

Macnaghten, Q.C., and *Doyne*, for the Appellant.

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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Leith, Q.C., and *C. W. Arathoon*, for the Respondent.

[*Smith* v. *Kay* (1) and *Nevill* v. *Snelling* (2) were referred to.]

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

These appeals are in two suits. The first was instituted by *Raja Agit Singh* against *Raja Bijai Bahadoor* and *Rani Janki Koer*, his wife, who is an independent talookdar, to recover a sum of Rs.1,37,000, principal and interest, upon a hypothecation bond of the 19th of June, 1878, from *Bijai*, against him personally, and for enforcement of a lien against the hypothecated property. The second suit was instituted by *Bijai* and his wife against *Raja Ajit Singh;* and it prayed for the recovery of possession, together with mesne profits, of certain property comprised in a sale deed of the 26th of May, 1879, and for cancellation of the deed on the ground of fraud, undue influence, and want of consideration.

The issues framed in the two suits were these: In the first suit, (1) "Was the Defendant No. 1 (*Bijai Bahadur*) in an unsound state of mind when he executed the deed of the 19th of June, 1878? (2) Was it executed under fraud and undue influence? (3) Did the Plaintiff (*Ajit Singh*) occupy a fiduciary position with reference to Defendant No. 1 (*Bijai Bahudur*)? (4) Was the deed executed without consideration having been received by Defendant No. 1?" In the next suit the issues were these: (1) "Was the sale deed executed while *Bijai* was in a sound state of mind? (2) Was the deed executed under fraud or undue influence? (3) The question of consideration."

The findings of the Judge of the Court of first instance on those questions are as follows, On the question of the incapacity of *Bijai*:—"I am of opinion that *Bijai's* mental capacity is of the lowest order short of idiotcy or insanity; that he has always been incapable of understanding complicated matters of business or exercising an independent judgment." As to fraud and undue influence:—"Bearing in mind the weakness of *Bajai Bahadur's*

(1) 7 H. L. 750. (2) 15 Ch. D. 679.

mental faculties, the fact that *Wahaj-ud-din* and his adherents, in collusion with *Ajit Singh*, were encumbering his estate; the peculiar circumstances which have already been mentioned in this judgment; the unconscionable and exorbitant nature of the transactions themselves, I am of opinion that the hypothecation deed of the 19th of June, 1878 (on which this suit is based) and the sale deed of the 26th of May, 1879, were executed under fraud and undue influence." With respect to the question of fiduciary position, he finds that *Ajit* was not technically speaking in a fiduciary position *quoad Bijai*. With respect to the consideration, he finds that some consideration was advanced; and the effect of his judgment is to order the deeds to be cancelled, but to remain as security for the payment by *Bijai* of such consideration as he received. This portion of the judgment will be more particularly referred to by-and-by. This judgment of the Subordinate Judge was affirmed by the Judicial Commissioner of *Oudh*. Against these judgments there are cross appeals.

The findings on the subject of fraud and undue influence are findings of fact, and their Lordships adhere to the rule, which they have more than once laid down, that they will not, except under peculiar circumstances, interfere with findings of fact by two Courts. But it has been contended on behalf of the Appellant in the first suit that there was no evidence to support the findings of the Judge.

This makes it necessary, not indeed to review the evidence at length, but to state shortly some of the main outlines of it. It appears that *Ajit* and *Bijai* were two neighbouring talookdars, distantly related. *Ajit* was the elder. He was a man of acute intelligence, and carried on the business of a money lender. *Bijai* was of weak intellect, had been paralysed soon after his birth, and was afflicted with epileptic fits, the tendency of which would be to deteriorate what understanding he had. *Bijai*, on his father's death, appears to have taken possession of the ancestral estate, and to have so mismanaged it that the Court of Wards thought it necessary to take the management of it upon itself. In 1870 *Bijai* applied to be restored as manager; and having been examined by the Court of Wards, the estate was released to him. The view taken of his capacity by the Court at

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that time appears from a judgment to be found in the record:—"The Court concurs with the assessors that the Defendant *Raja Bijai Bahadur Singh* is not of unsound mind and incapable of managing his affairs. He is feeble, and doubtless easily influenced by artful persons, and incapable of any great effort of body or mind, but he is not at all incapable in the sense meant by the Act." Then they go on to say:—"Decree for the Defendant," on the ground "that he is not a lunatic"; whereupon the management of this estate was, their Lordships cannot help thinking unfortunately for him, reintrusted to him.

With respect to his capacity there is some evidence given by himself in this record, by which, if it is correct,—and it was for the Subordinate Judge who heard the witnesses to determine whether it represented or not the true state of his mind,—it would appear, although he signed various deeds that were put before him, he was not acquainted with the nature of their contents; and that evidence, as far as the accounts are concerned, is in some degree corroborated by that of *Wahaj-ud-din*, his agent, who says the accounts were written in Persian, a language which he did not understand. Their Lordships, therefore, think there was ample evidence on which the Judge was justified in his finding as to the capacity of *Bijai*. This being so, it is obvious that a neighbour and a relation, of acute intelligence, would in all probability exercise a great influence over him. Upon his being reinstated in the management of his estates it became necessary for him to borrow for the purpose of paying arrears of the Government revenue; and in 1872 it appears that he sold some fifty villages to *Ajit* for the sum of Rs.1,25,000, the greater portion of which was appropriated to the payment of the Government revenue. That transaction has not been impugned, and it will not be necessary further to refer to it. At that time, in 1872, the two talookdars seem to have been somewhat estranged. In 1875 they were reconciled. About the time of the reconcilement *Ajit* took occasion to advise *Bijai* to employ as his agent or karinda a man of the name of *Wahaj-ud-din*. *Wahaj-ud-din* was entrusted by *Bijai* with extraordinary powers. We have a document styled a safinama, of the 25th of August, 1875, wherein *Bijai* entrusts to his manager powers of appointing general

agents; of dismissing and confirming patwaris and chowkidars; of executing documents, leases, and so on; power of borrowing money; power of executing simple bonds for borrowing money, or borrowing money by hypothecation or usufructuary mortgage of property; and a number of powers which the Judge of the first instance describes as making him in effect the proprietor of the estate. This document was little less than an abdication on the part of *Bijai* of his ownership of the estate in favour of the manager. It appears to their Lordships that a man in full possession of his faculties would not execute a document of this kind. This manager, *Wahaj-ud-din*, in pursuance of the powers here given him, hired a vast number of servants, displacing the old Hindu servants of *Bijai* by his own friends and protegés, as they are somewhere called, so that *Bijai* was surrounded by *Wahaj-ud-din* and *Wahaj-ud-din's* Mahomedan adherents. It seems by the evidence of several of the witnesses that *Ajit* and *Wahaj-ud-din* were in the habit of communicating together, and that *Ajit* exercised great influence over *Bijai*. The powers of borrowing given to *Wahaj-ud-din* were soon exercised. In December of that year a bond is prepared by *Wahaj-ud-din*, and is executed by *Bijai*, whereby he borrows a sum of Rs.6000 of *Ajit* at the rate of 24 per cent. The principal of that sum, together with interest, accumulated, and in February, 1876, two months after, another bond of Rs.9000 was given; and without going through the details of all these transactions, it appears that as many as twelve bonds were taken by *Ajit* from *Bijai* in the course of about three and a half years, the interest and the principal rolling on until finally it reached the sum of Rs.1,37,000, the subject matter of this suit. In these cases the money was sometimes paid to *Bijai*, and sometimes paid to his manager. He goes through the form —one can hardly suppose it to be much more— of writing his name at the bottom of the deeds, which were witnessed by the Mahommedan servants in the employ of *Wahaj-ud-din*.

It has been contended that there was no foundation for the finding in the following terms of the learned Judge that *Ajit* and *Wahaj-ud-din* acted in concert. "It is impossible not to feel convinced that *Wahaj-ud-din* was gravely mismanaging the estate;

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that by duping his master he was dishonestly benefiting himself; that this state of things was fully known to *Ajit Singh* (as admitted by him in his deposition); that the latter was all along anxious, fairly or unfairly, to encumber the estate so completely as to bring about the result which he seems to have had in view, viz., the acquisition of proprietorship of *Bijai Bahadur's* entire talooka."

It is true that there is no direct evidence in the record of a conspiracy between *Ajit* and *Wahaj-ud-din;* but they acted together against the interest of this unfortunate talookdar. His agent induced him to sign a number of bonds for sums of money which have been found not to be necessary for the purposes of the estate; and *Ajit,* whose duty as a relative, a friend, and a neighbour of *Bijai,* a man of weak intellect, was to have warned *Bijai* against the proceedings which were going on to his own ruin, so far from doing this, acts in concert with the unfaithful steward, and not only does he act in concert with him, but he profits principally by their joint transactions. Under these circumstances it appears to their Lordships that the learned Judge was amply supported by the evidence in his finding.

Such being the finding of the learned Judge, and the concurrent findings of two Courts, supported by adequate evidence, it follows that that judgment must be supported so far as the cancellation of the deeds is concerned, and that the appeal of *Bijai* must be dismissed.

But another question is raised by the cross appeal. The finding of the learned Judge, with respect to the consideration for the deeds, is in these terms (it seems that the evidence of advances was that money was paid from time to time, in the presence of the registrar of the Court, sometimes being handed to *Bijai* himself, sometimes to his manager):—"But having considered the evidence, I am satisfied that the principal sums in cash said to have been advanced at various times by *Ajit Singh* were made over either to *Bijai Bahadur,* or on his behalf to his karinda *Wahaj-ud-din;*" and in accordance with that finding, he says "I am of opinion that substantial justice will be done between the parties if the Plaintiff is decreed the principal sums

advanced by him, together with interest at 8 per cent. per annum on each of the sums calculated from the date of the suit, viz., the 23rd of January, 1880, and no interest allowed subsequent to the date of the suit." He treats as sums proved to have been advanced all the principal payments which were made. It has been argued, not that this finding is wrong in point of fact, but that the learned Judge has made a mistake in point of law; and their Lordships think that the judgment relating to these payments cannot be supported. The finding, as before observed, is that the sums were paid either to *Bijai Bahadur*, or on his behalf to the karinda *Wahaj-ud-din*. The learned Judge appears not to have applied his mind to the question as to how much actually got into the hands of *Bijai* himself; with reference to which sums, it would seem difficult to say that he could have a right to cancel the deeds without repaying them. But considering the relations that have been found to exist between *Ajit* and *Wahaj-ud-din*, their Lordships are of opinion that *Ajit* cannot raise a claim against *Bijai* merely by shewing that he paid money to *Wahaj-ud-din*; he must shew further that his advances were really applied to the benefit of *Bijai*, or were properly borrowed on his behalf.

Under these circumstances it appears to their Lordships that the decree of the Court below requires some amendment; and they propose to advise Her Majesty that that decree should be amended in this way: they think it should be varied by directing that, instead of the account which the munsarim is thereby ordered to take, it be referred to the munsarim to take the following accounts: first, of such sums advanced by *Ajit*, as shall be proved to have been paid to and received by *Bijai* personally; secondly, an account of such sums advanced by him as *Wahaj-ud-din* would have been justified in borrowing in the course of a prudent management of *Bijai's* estate; thirdly, an account of what is due upon such advances for simple interest at 8 per cent. from the date of the advance to the time of payment. Their Lordships cannot quite concur with the learned Judge in holding that the interest should be confined to the date of the suit. Their Lordships think that the decree in the other case, which is

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in many respects the same, but has peculiar circumstances affecting it, (that is, the first suit by *Bijai* and his wife,) should also be amended to the same extent.

Under these circumstances their Lordships will humbly advise Her Majesty that the decrees be varied in the manner stated. It appears to their Lordships that *Bijai* and his wife are entitled to the costs of both appeals.

Solicitors for the appellant: *Lawford, Waterhouse & Lawford.*
Solicitor for the respondent: *T. L. Wilson.*

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July 4, 23.

KALI DAS MULLICK . . . . . PLAINTIFF;

AND

KANHYA LAL PUNDIT (AND ON HIS DECEASE BEHARI LAL PUNDIT) AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Validity of Gift—Donor out of Possession—Construction.

Indefinite words of gift are calculated to convey all the interest of the grantor, but it is necessary to read the whole instrument to gather the intention.

Where the words in a deed (ikrarnama), "I put a stop to my interest" (in those talooks) "and withdraw my enjoyment thereof, and I make them over to you," are preceded by "in order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support by having the property under your authority and control":—

Held, that the indefinite words of gift must be limited by the purpose of the gift, and that it was the donor's intention that the donee should take the property only for life.

By Hindu law a gift of property, whether movable or immovable, may operate where no question of resumption arises to give to the donee a

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* *Present*:—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

right to obtain possession; and is not invalid by reason of its not being immediately followed by possession.

Where a donor has done all she can to complete the gift, is a party Defendant to the suit to set it aside, brought by a Plaintiff claiming adversely to both parties thereto, and admits the gift to be complete:—

Held, that such a gift cannot be set aside as utterly invalid, because the donor was out of possession, and no possession was ever given to the donee.

APPEAL from a decree of the High Court (May 9, 1882), affirming a decree of the Subordinate Judge of *Cuttack* (June 30, 1880), and dismissing the Appellant's suit.

The suit was brought by the Appellant, who claimed the property in dispute, under a gift in 1876, from the Respondent, *Roma Sundari Dasi*, and another. The above-named Respondent's father, who was the first Defendant, claimed as purchaser, under Court sale, of the right, title, and interest of *Ruttonmoni*, now deceased, to whom the property had admittedly been conveyed by *Roma Sundari* in 1841.

The facts are stated in the judgment of their Lordships.

The Subordinate Judge was of opinion that under the ikrar of 1841, *Ruttonmoni* only took a life estate, and that on her death the property reverted to *Roma Sundari*, whose gift to the Plaintiff was valid for her own life. But he considered that the suit was barred under art. 144 of Act XV. of 1877, "for the possession of the objecting Defendant was adverse to the trustee, *Ruttonmoni*, and through her also to *Roma Sundari*, the person by whom that trust was created, and being so, was a bar to both, and, as it had commenced more than twelve years before the suit was brought, the suit was clearly beyond time, and as such ought to be dismissed." He also found that *Tarini Churn* was not made out to be the next heir after *Roma Sundari*.

The High Court dismissed the appeal, on the ground that under the ikrar of 1841, *Ruttonmoni* took an estate for the life of *Roma Sundari*, which was still valid and existing as against her and her donees. After reciting the ikrar, and the view taken by the Subordinate Judge, the Court proceeded as follows:—

"There are, it must be conceded, several circumstances which point in favour of this view. The expressed object and motive of the ikrar was to provide for the performance of certain religious

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rites and festivals by *Ruttonmoni*, and for her support, both matters necessarily restricted to her lifetime. The grantor and grantee were both of them persons whose legal estate in the family property was for life only: nothing is said about the duration of the interest conveyed. It may be that each party took for granted the fact that the interests with which they were dealing were life interests only. It is conceded that *Roma Sundari* must be deemed to have conveyed, at most, only her own life interest; it follows, not unnaturally, that she may have intended only to deal with her mother-in-law's life interest, though she did not, in express terms, limit the grant to this, but left it to be inferred from the personal object of the grant, and the personal trust by which it was accompanied.

"The degree in which the circumstances of a Hindu widow should be taken into account in construing instruments in which she is concerned, was much considered by the Judicial Committee of the Privy Council in *Sreemutty Rabutty Dassee* v. *Shib Chunder Mullick* (1). In that case the deed of arrangement had declared the widow entitled to Rs.59,000 as her sole and separate property, for her own absolute use and benefit; and the question was, whether these words gave her an absolute right in the property (so that she could by alienation defeat the next heir's estate), or merely meant that in her representative capacity she was to hold the property in complete severalty, and not as part of the joint estate. The purpose of the deed was avowedly to settle the amount of share to which each of the three sons of *Bheem Chund* and the widow of *Dwarka Nath*, the fourth son, was entitled. The widow was described as sole widow, heiress, and legal personal representative of *Dwarka Nath Sain*. The deed sets forth the payment to the three sons of *Bheem Chund* of the share to which each was entitled; and that the widow had claimed the share to which she, as her husband's heir, was entitled; and that disputes had arisen as to 'the exact amount in value of her share and proportion in right of her deceased husband.' It then went on to say that it had been agreed that the widow should be held entitled to Rs.59,000, in full discharge of all her claims, which sum was declared to be 'the sole, absolute, and proper moneys of the

(1) 6 Moore, Ind. Ap. 1.

widow to her separate use.' In construing this deed their Lordships said, 'You must look at the words of the deed with reference to the parties who use them, and the grant must be consistent with that; consistent with the interest of those who make the grant.' And finding that the object of the deed was manifestly to discharge the representatives of *Bheem Chund's* estate from any claim on it by the representatives of *Dwarka Nath's* estate, and that the widow was made a party to the deed in that capacity, they considered that the words, 'to her separate use,' &c., merely meant that she was to hold the property separate from the joint estate; but subject to the ordinary incidents of a Hindu widow's estate.

"In the present case the circumstances are somewhat different. It is not here, as in that case, proposed to make the deed have an effect which Hindu law would not sanction, and which was obviously not within the scope of the parties' intention. There was nothing contrary to law or usage in *Roma Sundari* conveying her life interest in a part of the family estate to her mother-in-law if she chose, for the sake of a settlement of their disputes, to do so; nor can we infer that such may not have been the intention of the parties, from the mere fact that the object of the deed is stated to be the performance of the rites by *Ruttonmoni* and her maintenance; though it is possible enough that it was about the state of things in *Ruttonmoni's* lifetime that *Roma Sundari* was mainly thinking when she made the deed. We think that we must apply the rule laid down in the *Indian Succession Act*, and in the recently-passed *Transfer of Property Act* on the subject, because, although that Act will not be in force till July, it enacts what is unquestionably the present law on the subject. Sect. 8 provides that unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the incidents thereof.

"Then, can we say here that such a different intention is necessarily implied? We do not think so.

"Upon the whole, we are of opinion that the same expressions in the deed favour the view that the intention of the deed was to

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create a trust estate, which expired at *Ruttonmoni's* death; that intention is not sufficiently indicated to justify us in setting aside the distinct and unconditional terms of the grant, and we think, therefore, that that grant must be deemed to have been, at any rate, of all the estate in the talooks of which *Roma Sundari* could dispose; and that accordingly, as she is still alive, *Ruttonmoni's* interest has not expired; and that the present action must fail."

Cowie, Q.C., and *Woodroffe*, for the Appellant, contended that, according to the true construction of the ikrarnama of June 13, 1841, regard being had to the expressed object of the instrument, and the personal trust by which it was accompanied, the life interest of the Respondent *Romasundari Dasi* did not pass thereby. On the contrary, it ought to have been held that on the death of *Ruttonmoni Dasi* in her lifetime, the Respondent was entitled to re-enter upon the properties comprised in the said ikrarnama, and to hold the same as of her former estate of a Hindu widow. As regards the question of limitation, the case does not come under either art. 134 of Act XV. of 1877, and the adverse possession referred to in art. 144, did not begin till the death of *Ruttonmoni*, within twelve years of which date the suit was brought.

Doyne, and *Mayne*, for the Respondent *Behari Lal Pundit*, contended that the deed of gift, which was the basis of the Plaintiff's title, was utterly invalid, inasmuch as the donor was out of possession at the time, and no possession was ever given to the donee. A gift by a Hindu is invalid without delivery of possession and acceptance. It is acceptance which makes the thing pass. A person who is out of possession cannot make a gift until he has recovered possession: *Dagai Dabee* v. *Mothuranath Chattopadhya* (1); *Kishto Soondery Dabea* v. *Runee Kishtomotee* (2); *Mayne's* Hindu Law, sect. 329; *Lalubhai Surchand* v. *Bai Amrit and Others* (3); *Raja Sahib Perhlad Sein* v. *Baboo Budhoo Singh* (4); *Ranee Bhobosoondree Dasseah* v. *Issurchunder Dutt* (5);

(1) Ind. L. R. 9 Calc. 854.
(2) Marsh. 367.
(3) Ind. L R. 2 Bomb. 299.
(4) 12 Moore, Ind. Ap. 306.
(5) 11 Beng. L. R. 36; S. C. 18 Suth. W. R. 140.

Ram Khelawun Singh v. *Mussamut Oudh Koer* (1); *Bishonath Dey Roy* v. *Chunder Mohun Dutt Biswas* (2); *Kachu Bayaji* v. *Káchoba Vithoba* (3); *Harjivan Anandram* v. *Naran Haribhai* (4); *Girdhar Parjaram* v. *Daji Dulabhram* (5). According to the trúe construction of the ikrarnamah, the whole interest of the grantor passed to *Ruttonmoni*, under whom the Respondent claims. The words of gift were indefinite, and must be construed against the donor. Consequently the Respondent has a good title against *Romasundari* and the Appellant who claims under her. Reference was made to arts. 134 and 144 of Act XV. of 1877.

Cowie, Q.C., replied.

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July 23.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

On the 13th of June, 1841, *Roma Sundari Dasi*, widow of *Srinath Bromho*, executed an ikrarnama, which was in the following terms:—

"To the most respectable *Srimoti Ruttonmoni Dasi*, widow of the late *Ram Cumar Brohmo*, mother of the late *Srinath Bromho*, inhabitant of *Kona*, purgana *Havelisuhur*.

"This ikrarnama, executed in 1248 (1841 42) by *Roma Sunduri Dasi*, widow of the deceased *Srinath Bromho*, inhabitant of *Kona*, purgana *Havelisuhur*, at present residing in *Chitpur*, in the district of 24-Purgunas, sheweth:—

"That the taluqs comprised in the mouzahs mentioned in the annexed schedule, which were purchased in my husband's name, and which are recorded in my name in the collectorate sheristas of the districts of *Cuttack* and *Puri*, are under your control, with all rights appertaining thereto; and you have been performing the deb-seba, and have been entertaining religious mendicants, and have been celebrating the dole and durgotshub festivals (which were originally instituted by my deceased husband and father-in-law), by residing in the house at *Kono*. In order that you may

(1) 21 Suth. W. R. 101.
(2) 23 Suth. W. R. 165.
(3) 10 Bomb. H. C. R 491.
(4) 4 Bomb. H. C. R., A. C. J. 31.
(5) 7 Bomb. H. C. R, A. C. J. 4.

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perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support, by having the property under your authority and control, I put a stop to my interest (in those taluqs) and withdraw my enjoyment thereof, and I make them over to you, with this promise, that you may remove my name from the Collector's sherista in respect of the taluqs named in the schedule, and you may have your name substituted for it; that you should have undisputed possession in the mofussil; that you should take the lowajima papers and the arrears of rent from the amlas and officers appointed by me; that you should appoint men who are under your control to the offices of amlas, and through them you should collect rents from the tenants in the mofussil; that you should perform the above-mentioned sebas, and should provide for your support. I have no right or claim to the taluqs. If I advance any claim at any future time, such claim should be rejected. I have nothing to do with the profits and loss of the taluqs. You cannot claim anything from me. I have no claim against you. Wherefore, in health of body, in the enjoyment of my senses, and in calmness of judgment, I execute this ikrar. I shall never act in contravention of the terms of this ikrar.

"The 2nd Assar of the above-mentioned year (13th of June, 1841).

"Schedule of the Taluqs.

	Mouzahs.
"Taluq *Santrapuri*, &c.	19
Purchased *Bhiti* mehal	1
Mehal *Lakhraj* resumed	1
Taluq *Berhampur*	1
	22
"Taluq *Jhareswurpur*	1
Taluq mouzah *Bangalpur*, zilla *Puri* . .	1
Mouzah *Durgadaspur*	1
	25"

Srinath Brohmo was the son of *Ram Cumar Brohmo* and *Ruttonmoni Dasi*, and the talooks mentioned in the schedules had been

dedicated by *Ram Cumar* and *Srinath* to the service of two idols. *Srinath* died in 1838, having survived his father, the date of whose death did not appear. On the 24th of December, 1864, one *Banchhanidhi Moharana*, having obtained a decree against *Ruttonmoni* on the 25th of February, 1862, and having applied for a sale of a ten-annas share of the zemindary of the taluok *Santrapur*, which was the share of *Ruttonmoni Dasi* by virtue of the ikrarnama, the same was publicly sold, and the Respondent *Kanhya Lal Pundit* became the purchaser for Rs.17,800 of the rights and interests of *Ruttonmoni* therein, as appears by the sale certificate dated the 27th of January, 1865. *Ruttonmoni* died on the 16th of February, 1867. On the 1st of February, 1876, *Roma Sundari* and *Tarini Churn Brohmo*, who was then the presumptive heir on the death of *Roma Sundari*, executed a deed of gift to *Krishna Mohini Dasi*, the wife of the Appellant, which is in the following terms:—

"This deed of gift, executed by *Roma Sunduri Dasi*, widow of the late *Srimoti Bromho*, inhabitant of *Kona*, purgana *Habilisuhur* in the district of 24-Purganas, at present residing in *Dandmal Sahi*, in *Puri*, and by *Tarini Churn Brohmo*, son of late *Bhoyrub Chunder Bromho*, inhabitant of *Kastodanga*, purgana *Rajnuggur*, sub-district *Ranaghat*, in the district of *Nuddea*, sheweth:—

"That, on the death of my husband, I, *Roma Sundri Dasi*, got possession by right of inheritance of his ancestral zemindaries, and the zemindaries which were recorded in his own name, and of the houses, &c. In order to pay off the debts incurred by my husband and father-in-law, I sold taluq *Juggurnath Prosad*, &c., of purgana *Burjang*, and taluq *Rambhila* of purgana *Randia Orgura*, and taluq *Mowajib* appertaining to purgana *Senawut*, pertaining to *Balasur* district, to *Monmohini Dasi* and *Khettermoni Dasi* and *Doyamoni Dasi*, and other taluqs to other persons. By this means I paid off the debts. As I am residing in this holy city, I made over to my mother-in-law, the late *Ruttonmoni Dasi*, under the ikrarnama, dated 2nd Assar, 1248 (14th of June, 1841), taluq *Sautrapur* and the purchased mehal *Dihi*, and resumed mehal *Lakhraj* pertaining to it, and taluq *Berhampur*, and taluq *Jharswurpur*, and taluq *Durgadaspur*, &c., situate in the

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district of *Cuttack*, in order to provide thereby for the seba of my husband's ancestral idols, viz., *Lukhi Narain* and *Sridhur*, and for the maintenance and religious ceremonies of my mother-in-law, the late *Ruttonmoni*. Accordingly my mother-in-law performed the seba of the idols and other duties till her death, which occurred in Falgun, 1273 (February and March, 1867). On her death those properties reverted to us. But as those zemindaries, &c., were in disorder during my mother-in-law's lifetime, after her death *Rungomoni Dasi*, the wife of the late *Hurihur Bromho*, paid from her own funds for the seba of the above-mentioned idols. But she too is now unable to discharge those duties. And I am residing in this holy city of *Puri*. And I, *Turini Churn Bromho*, am also unable to keep up the seba of the idols; hence the seba of the idols has been interrupted. You are a near relation of ours. You are willing to undertake the seba of the idols. We too are pleased with you. We give the idols to you. We give, of our own accord, taluq *Santrapur* and taluq *Berhampur*, zemindaries, and the brick-built dwelling-house, and garden and lands and jamas, &c., in *Kona*, as described in the annexed schedule, to you, and execute this deed of gift. From this moment you should keep the idols under your control, take possession of the zemindaries, &c., collect the rents, recover the zemindaries and other properties, with mesne profits, from persons from whom they may be due since the death of the late *Ruttonmoni Dasi*, who was the mother-in-law of *Roma Sunduri Dasi*, and the grandmother (by relation) of *Tarini Churn Bromho*, pay the revenue in the Collectorate, and the rents to the zemindars, and spend Rs.1200 a year, or Rs.100 a month, for the sheba of the idols. From this day we appoint you as the sebait of those idols. You, your sons, grandsons, and your heirs may keep up the seba of the idols, and enjoy and possess the properties named hereinafter. But you and your sons, grandsons, and other heirs will not have the right to alienate those properties by sale or gift. If at any time we or our heirs claim these properties, such claim should be rejected."

The idols given by this instrument were handed over to the grantee. But as regards the land, *Kanhya Lal Pundit* was at this time in possession, claiming to be so by virtue of his purchase

on the 24th of December, 1864, and when *Krishna Mohini Dasi* attempted to take possession she was prevented by his servants. She died on the 4th of November, 1878, having made her will, whereby she appointed her husband, the Appellant, and one *Behari Lal Mitter*, her executors, and directed that the Appellant should, during his life, perform the worship of the two idols and manage the entire estate. On the 23rd of November, 1878, the Appellant alone proved the will, and on the 18th of December, 1878, he brought a suit to recover possession of the ten-annas share of the talook *Santrapur* against *Kanhya Lal Pundit* as the principal Defendant, but also making *Roma Sundari* and the minor sons of *Tarini Churn*, who had died, Defendants. *Roma Sundari*, by her written statement, admitted the Plaintiff's claim, and said that she and *Tarini Churn*, who was her reversionary heir, as also of her husband, made an absolute gift of the zemindary in claim, and the ancestral deb-seba to *Krishna Mohini Dasi*. She was also examined as a witness and cross-examined, when she identified the deed of gift and asserted the fact of conveyance to *Krishna Mohini*. *Kanhya Lal*, in his written statement, set up various grounds of defence, including the Law of Limitation, and also that "*Roma Sundari* was never in possession of the disputed property; hence the deed of gift executed by her is of no use, and is invalid."

The Subordinate Judge of *Cuttack* held that the possession of *Kanhya Lal* was adverse to *Ruttonmoni*, and through her also to *Roma Sundari*, and that art. 144 of Act XV. of 1877 was applicable, and as the possession commenced more than twelve years before the suit was brought, it was beyond time. On this ground he dismissed the suit, but in case the Appellate Court might take a different view of the question of limitation, he gave his opinion that *Ruttonmoni*, under the deed, only acquired a life-interest, and that on her death the property would revert to the creator of the trust.

The High Court at *Calcutta*, on appeal, held that the "grant must be deemed to have been at any rate of all the estate in the talooks of which *Roma Sundari* could dispose," and that as she was still alive *Ruttonmoni's* interest "had not expired." On this ground they affirmed the decree. The objection in the written

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statement that *Roma Sundari* was never in possession of the disputed property, and that the deed of gift was consequently invalid, was not noticed by either Court.

The questions in the present appeal are clearly stated in the reasons at the end of the Respondents' case.

"1. Because the deed of gift, which is the basis of the Plaintiff's title, is utterly invalid, inasmuch as the donor was out of possession, and no possession was ever given to the donee.

"2. Because the interest of *Ruttonmoni*, under which this Respondent (*Behari Lal*, the representative of *Kunhya Lal*, who has died pending this appeal) was in possession, was and is a valid and subsisting interest as against *Roma Sundari* and the Appellant, who claims under her.

"3. Because the suit was barred by the law of limitation."

Their Lordships will first consider the second question. That depends upon the construction of the ikrarnama.

The rule laid down in the *Indian Succession Act* must not be applied to it, because it is not a will, nor the rule laid down in the *Transfer of Property Act*, because that was not in force until a later date. It is not necessary to decide whether the *Transfer of Property Act* enacts what was unquestionably the law before. The rule of law was that indefinite words of gift were calculated to convey all the interest of the grantor, but that it was necessary to read the whole instrument to gather the intention. It is a question to be decided when it arises, whether the framers of the Act have not, consciously or otherwise, so expressed themselves as to lay down a more positive rule in favour of absolute gifts. In this case the intention must be collected from the whole of the instrument. The words, "I put a stop to my interest (in those talooks), and withdraw my enjoyment thereof, and I make them over to you," must be read in connection with the words which precede them,—"In order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support, by having the property under your authority and control." It appears to their Lordships that the indefinite words of the gift must be limited by the purpose of the gift, and that it was *Roma Sundari's* intention that *Ruttonmoni* should take the property only for her life.

It will be convenient to consider next the question of limitation. The learned counsel for the Respondent relied upon arts. 134 and 144 of Act XV. of 1877. The former applies to suits to recover possession of immoveable property conveyed or bequeathed in trust, or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration. Their Lordships intimated in the course of the argument that the purchase at the sale in execution of the rights and interests of *Ruttonmoni*, could not, as between the purchaser and *Roma Sundari*, be considered to fall under this article. Art. 144 gives twelve years from the time when the possession of the Defendant becomes adverse to the Plaintiff. During *Ruttonmoni's* life possession was not adverse to *Roma Sundari* (the Plaintiff's title began long after), and the suit was brought on the 18th of December, 1878, within twelve years of her death.

It remains to consider the third question. In the Respondent's reasons it is broadly stated that the deed of gift was utterly invalid, inasmuch as the donor was out of possession, and no possession was ever given to the donee. But it must be observed that in this case the dispute as to the validity of the gift is not between the donee and the donor or a person claiming under her. The donor is a Defendant, and affirms the validity. The person who disputes it claims adversely to both. Several authorities were quoted in support of the Respondent's contention, and it is necessary to see how far they are applicable to such a suit as the present. *Harjivan Anandram* v. *Naran Harilhai* (1) was cited to shew that a gift of land was not complete by Hindu law without possession or receipt of rent by the donee. It came before the High Court on a special appeal. The suit was to recover two bighas of land from the defendant, who held it as tenant. The Assistant-Judge, on appeal from the Moonsiff, found that the land in dispute had been given to the plaintiff by one *Bapu*, but that the gift had never been completed by a transfer or delivery of the property, and the donor *Bapu* then denied the gift altogether, and he held that the gift never having been completed, the promise to give was null and void. It would seem, from the statement of the defence, that the tenant had continued

(1) 4 Bomb. H. C. R. (A. C. J.) 31.

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to pay rent to the donor. The High Court affirmed the decree. It is not necessary to set out here the authorities which were quoted. It is sufficient to say that, with the exception of the passage from the Mitakshara, they all shew that the reason for delivery being necessary is that the gift may not be resumed. This appears very clearly from the text of *Yajnyawalcya*, Dig., book 2, v. 32, where it is said, "Let the acceptance be public, especially of immoveable property, and delivering what may be given and has been promised, let not a wise man resume the donation." The last sentence of the passage in the Mitakshara is omitted in the report, but if the whole is read in connection with the preceding clauses of the section, it seems to have reference to the comparative strength of a title with possession and a title without it. The case differs most materially from the present, where the donor has done all she can to complete the gift, and is a party to the suit, and admits the gift to be complete. Another of the cases cited is *Girdhar Parjaram* v. *Daji Dulabhram* (1). There the plaintiff brought a suit to compel the defendants to pull down a partition wall which they had built between their property and the plaintiff's, and to restore certain ground which they had encroached upon. The plaintiff alleged that he had purchased the ground by a deed of sale. It was found that the plaintiff bought the house and land in question after the supposed encroachments were made, and they were sold to him according to measurements in a former bond which was not before the Court. The High Court quoted the judgment of this Board in 12 *Moore*, Ind. App., 306 (which will be presently noticed) as applicable to the case, but they decided it on the ground that the plaintiff had given no evidence to shew what was the extent of the land which the deed of sale purported to transfer to him, and there was nothing to prove that the old boundaries included the site in dispute. The head-note to the report takes no notice of this, and represents the case as decided upon the ground that, by Hindu law, it is requisite that the vendor should, at the time of sale, be in possession of the property sold. It was clearly not decided upon that ground, and the inaccuracy of the head-note has led to the case being treated as an authority for what was not

(1) 7 Bomb. H. C. R. (A. C. J.) 4.

decided in it. These cases have been noticed somewhat fully on account of the judgment of the *Bombay* High Court in *Kachu Bayaji* v. *Kacholba Vithoba* (1), which was quoted for the Respondent. There, in a suit to recover possession of a house and land, it was held that by Hindu law a change of possession is necessary to complete the sale of it, and that it could not be supplied where the vendor had no possession to deliver. The judgment contains the following passage:—"It is perfectly clear from the proceedings that, at the date of this transaction (the sale), the house was not in possession of the defendant *Magan*. The vendor, therefore, sold what he could not sell according to Hindu law, as laid down in *Harjivan Anandram* v. *Naran Haribhai*. The texts there cited make a transfer of possession equally necessary to the completion of a sale as of a gift, and the delivery of possession of things having a material existence is regarded by the Hindu law as essential to their legal transfer. Such appears to be the principle of the decision in *Girdhar Parjaram* v. *Daji* (2)." There appears in this to be a misapprehension as to both cases. In the former, the question was whether a gift was complete without delivery. No law was laid down as to a sale, and only one of the texts cited mentioned a sale. That is the passage from the Mitakshara. As to the latter case, it has been shewn what the true ground of decision was.

Their Lordships will now consider the two judgments of this Committee upon which the Respondent's counsel relied. In *Raja Sahib Perhlad Sein* v. *Baboo Budhoo Sing* (3) it is said:—"They (the Judges of the Sudder Court) seem to have ruled that the effect of the execution of a bill of sale by a Hindu vendor is, to use the phraseology of English law, to pass an estate irrespectively of actual delivery of possession, giving to the instrument the effect of a conveyance operating by the *Statute of Uses*. Whether such a construction would be warranted in any case, is, in their Lordships' opinion, very questionable. It is certainly not supported by the two cases cited in the judgment under review, in both of which actual possession seems to have passed from the vendor to the purchaser. To support it the execution of the bill of sale

(1) 10 Bomb. H. C. R. 491. (2) 7 Bomb. H. C R. (A. C. J.) 4.
(3) 12 Moore, Ind. Ap. 306.

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may be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed *in futuro*, and upon the happening of a contingency, of which the purchaser may claim a specific performance if he comes into Court shewing that he has himself done all that he was bound to do." The suit was brought by the purchaser against the vendor, and their Lordships held upon the facts that the purchaser had not done this, and that the contract had become incapable of being performed according to the true meaning and intent of the contracting parties.

In the other case, *Ranee Bhobosundree Dasseah* v. *Issurchunder Dutt* (1), the suit was based upon a deed executed by *Jogessur Ghose* in favour of the plaintiff. In the judgment, their Lordships, after quoting what was said in the former case, say:—"Having regard to this case and to the provisions which have been referred to of the deed, their Lordships are of opinion that it did not operate as a present transfer of the property, but as an agreement to transfer so much of it as might be recovered in a suit to be instituted to which both *Jogessur Ghose* and the plaintiff were to be parties."

Neither of these decisions is applicable to the present case. The ground of them is that the plaintiff was not entitled under the terms of the contract of sale to possession. In this case the Appellant is under the terms of the gift, and, according to the construction which their Lordships have put upon the ikrarnama, entitled to possession, and their Lordships see no reason why a gift or contract of sale of property, whether moveable or immoveable, if it is not of a nature which makes the giving effect to it contrary to public policy, should not operate to give to the donee or purchaser a right to obtain possession. This appears to be consistent with Hindu law. On the principle contended for by the Respondent, so long as he prevents the true owner from taking possession, however violently or wrongfully, that owner cannot make any title to a grantee. Mr. *Mayne* earnestly contended that what is said in the books about the completion of a gift by

(1) 11 Beng. L. R. 36.

possession is founded on a public policy relating to land and analogous to the feudal rule requiring investiture or livery of seisin. But the texts relate to moveables as well as to land; and, with one not very clear exception, they relate to intended gifts which it is contemplated that the donor may take back until they are perfected. They appear to rest on a principle which has nothing to do with the feudal rules, and the European analogy to which is rather to be found in the cases relating to voluntary contracts or transfers, where, if the donor has not done all he could to perfect his contemplated gift, he cannot be compelled to do more. In this case, the donor has, in fact, done all she could, and, as she still desires to support her gift, there is no question of compelling her to do more. The Respondent has failed on all the grounds, and the Appellant is entitled to possession of the property in suit with mesne profits. Their Lordships will therefore humbly advise Her Majesty to reverse the decrees of both the lower Courts, and to decree that the Plaintiff is entitled to possession of the property in suit, together with all the costs incurred and to be incurred in the lower Courts, and to remit the case to the High Court to pass such a decree for mesne profits as it may consider the Plaintiff to be entitled to.

The Respondent, *Behari Lal Pundit*, will pay the costs of this appeal.

Solicitor for the Appellant: *T. L. Wilson.*

Solicitors for the Respondent *Behari Lal Pundit: Barrow & Rogers.*

J. C.*
1884
July 2.

GUNGAPERSHAD SAHU . . . . . DEFENDANT;

AND

GOPAL SINGH . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Suit to set aside Sale in Execution—Procedure.

Case where a sale in execution was ordered to be set aside, it appearing that a consent petition for postponement had been on the day of sale, by mistake of the judgment debtor, presented to the wrong Court, and that the decree holder had in the absence of the judgment debtor allowed the sale to proceed, and himself had become the purchaser.

APPEAL from a decree of the High Court (Dec. 13, 1881), varying a decree of the Subordinate Judge of *Tirhoot* (April 12, 1880), both of them being substantially in favour of the Respondent, who was Plaintiff in the suit.

The Appellant held a decree, dated the 5th of July, 1876, against the Respondent for Rs.9163, with interest and costs.

In execution of this decree the properties in suit, consisting of eight mouzahs, or shares thereof, of the aggregate value of Rs.51,000, were attached and advertised for sale, the sale day being fixed for the 15th of December, 1877. Upon that day the Appellant and the Respondent mutually agreed to postpone the sale for two months.

In pursuance of this agreement, a petition was drawn up, signed by the Respondent and his pleader, praying that the 15th of February, 1878, be fixed as the date of sale. The petition was countersigned by the pleader for the Appellant, acting under the instructions of his client, and consenting to the prayer of the petition, "provided the attachment will continue." This petition was thereupon presented to the wrong Court; that is, to the first Subordinate Judge, instead of the District Judge who had

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, and SIR ARTHUR HOBHOUSE.

passed the decree and was charged with the execution thereof. The first Subordinate Judge passed an order as prayed.

The District Judge, not having made any order of postponement, and not having any petition for postponement on his file, proceeded with the sale, in the absence of the Respondent and his advisers, who had left the Court under the belief that the sale was postponed. The Appellant was present, allowed the sale to proceed, himself became the purchaser of all the mouzahs for the sum of Rs.7000, and was subsequently put in possession.

On the 10th of December, 1878, the Respondent sued, in the Court of the Subordinate Judge, contending that the sale was fraudulent, contrary to law, and invalid, and praying that it might be set aside, and that the Respondent might be put in possession of the shares of the mouzahs in question.

On the 31st of January, 1879, the Appellant filed a written statement, in which he denied that there was any fraud in the sale. He charged that filing the petition in the wrong Court, was the Respondent's mistake; that his (the Appellant's) pleader, *Baboo Umeschunder Roy*, had informed the Judge that time had been allowed and that a consent petition had been signed, but, nevertheless, the sale proceeded, for which the Appellant was not to be blamed, in law or justice.

The First Court was of opinion "that the Defendant had taken unconscionable advantage with reference to the execution sale," and decreed that the Respondent should get possession of the property, upon paying to the Defendant the sum due under the decree, without interest, within a period of two months, and that the Defendant should retain the profits realised by him, in lieu of interest.

The High Court (*Romesh Chunder Mitter* and *Maclean*, JJ.) substantially affirmed this view of the transaction. They said—"We think, after the arrangement come to between the parties, the Defendant was not competent to purchase, and that as between the parties it should be considered that the auction sale passed on title. Although we do not agree with the Lower Court in stigmatising the Defendant's conduct as grossly fraudulent, yet, in our opinion, it would be breach of faith on his part to retain the advantage of his purchase. The facts of this case are, in

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many respects, similar to those of the case reported at p. 91 of 8 Moore's Ind. Ap., and we think that the principle of that decision is applicable here."

They, however, varied the decree of the Court below, and having regard to the fact that the Plaintiff owed money, under a decree, to the Plaintiff's father as well as to the Plaintiff, directed as follows:—"That on the Plaintiff's depositing in Court, or paying to the Defendant and his father within two months from this date, the money still due to them under their decrees, with interest at the rate provided in those decrees up to the date when the process for delivery of possession of the disputed property was executed, the Defendant do reconvey the property in suit to the Plaintiff. Each party to bear his own costs both in this as well as in the Lower Court. We allow no interest upon the decrees aforesaid from the date of delivery of possession, because we are of opinion that the Defendant, having enjoyed the profits of the property in dispute, is not entitled to charge interest upon the decrees as well. The Plaintiff will not be entitled to claim any wasilat in any future suit from the Defendant for the period during which he may have been in possession."

Cowie, Q.C., and *C. W. Arathoon*, for the Appellant.

Cowell, for the Respondent.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

It appears to their Lordships in this case that the Judges of the Court below were right in ordering the sale to be set aside. The only question is as to the terms upon which it ought to be set aside; and in this respect their Lordships think that substantially the High Court was right. The time fixed by the High Court was two months from the 13th of December, 1881. In consequence of this appeal having been preferred that time has now expired, and the date must be altered. It appears also to be uncertain what is the amount due to the Defendant and his father under the decrees which are mentioned by the High Court.

Their Lordships think the decree should be varied so as to

meet those circumstances. They will humbly advise Her Majesty to order that the cause be remitted to the High Court to cause the amount due to the Defendant and his father under the decrees referred to in the decree of the High Court, with interest at the rate, and up to the time mentioned in the decree of the High Court to be ascertained; and that upon the Plaintiff's depositing in the Lower Court, or paying to the Defendant and his father, within two months from the time of that ascertainment, the amount so ascertained to be due, the Defendant do reconvey the property in suit to the Plaintiff, the said Plaintiff not being entitled to claim from the Defendant any wasilat for the period during which he may have been in possession of the property. In all other respects the decree of the High Court ought to be affirmed.

The Appellant must pay the costs of this appeal.

Solicitor for the Appellant: *T. L. Wilson.*

Solicitors for the Respondent: *Barrow & Rogers.*

RAJAH AMIR HASSAN KHAN . . . . PLAINTIFF;

AND

SHEO BAKSH SINGH . . . . . DEFENDANT.

J. C.*
1884
June 20.

ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.

Procedure—Power of Revision—Sect. 622 *of Act X. of* 1877, *as amended by sect.* 92 *of Act XII. of* 1879.

Where the judges of the lower Courts have jurisdiction to decide a question and decide it, no appeal lying from such decision, the Judicial Commissioner has no power under sect. 622 of Act X. of 1877, as amended by sect. 92 of Act. XII. of 1879, to call for the record of the case and pass an order therein, unless the judges of the lower Court have acted illegally or with material irregularity.

APPEAL from a judgment of the Judicial Commissioner (Feb. 7, 1880) reversing and cancelling as under sect. 622 of Act X. of

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1877 as amended by a later Act, a decree of the District Judge of *Sitapur* (Sept. 5, 1879) whereby a decree of the extra Assistant Commissioner (June 25, 1879) was confirmed.

The suit was brought by the Appellant for possession on redemption of a three-fourth share in *Kaka Khanpur*. It was eventually dismissed by the Judicial Commissioner with costs in all three Courts.

The first two Courts having decreed in favour of the Appellant the second decree became final under sect. 622 of Act X. of 1877. A petition, however, was presented to the Judicial Commissioner, alleging that the first Court had no jurisdiction to try the case, and asking that the record might be sent for and the decrees reversed. The Judicial Commissioner did not find thereon that the first Court had no jurisdiction, but that "the Courts below have exercised their jurisdiction illegally and to the material prejudice of the applicant," and thereon founded the decree appealed from.

Graham, Q.C. (*Woodroffe* with him), for the Appellant, contended that unless it were established that the first Court had no jurisdiction, it followed that the Judicial Commissioner had no power to grant the prayer of the petition. He had no general power of revision under sect. 622; and in assuming such power had erroneously interpreted the word "illegally" in sect. 622. Whether the first Courts had come to a right decision or not they acted within their jurisdiction, there was no appeal from their decision and no power to revise it. Reference was made to the High Courts Act, sect. 15; *Tej Ram* v. *Harsukh* (1); *Ex parte Lakhykant Bose* (2).

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The question in this case depends upon the proper construction to be put upon Act X. of 1877, sect. 622, and upon Act XII. of 1879, sect. 92, by which the former section was amended. According to Act XIII. of 1879, sect. 21, there was no appeal in this

(1) Ind. L. R. 1 All. 105. (2) Ind. L. R. 1 Calc. 180.

case from the Lower Court of Appeal to the Judicial Commissioner. But sect. 622 of Act X. of 1877 enacted that "the High Court," —and in this respect the Judicial Commissioner exercises the same powers as the High Court—"may call for the record of any case in which no appeal lies to the High Court if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, and may pass such order in the case as the High Court thinks fit." By sect. 92 of Act. XII. of 1879 that section was amended by the insertion after the words "so vested" of the following words, "or to have acted in the exercise of its jurisdiction illegally or with material irregularity." The question then is, did the judges of the Lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity.

Their Lordships therefore think that under sect. 622 of Act. X. of 1877, as amended by sect. 92 of Act XII. of 1879, the Judicial Commissioner had no jurisdiction in the case. Under these circumstances their Lordships will humbly advise Her Majesty to allow this appeal, and to reverse the judgment of the Judicial Commissioner, and to order the respondent to pay the costs incurred before the Judicial Commissioner. He must also pay the costs of this appeal.

Solicitors for Appellant: *Watkins & Lattey.*

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CONSTRUCTION OF WILL.] *Held*, that a gift in remainder expectant upon the termination of a life estate is accelerated and not destroyed by reason of the gift of the life estate being void.—*Lainson* v. *Lainson* (5 De G. M. & G. 754) approved.—*Quære*, whether a widow of an *Oudh* talukdar is by virtue of her right to maintenance a person who would have succeeded to an interest in his estate within the meaning of Act I. of 1869, sect. 13, clause (1), so that an unregistered will would operate in her favour. AJUDHIA BUKSH *v.* MUSSAMUT RUKMIN KUAR 1

COVINOUS INSTRUMENTS VOID IN EQUITY AND GOOD CONSCIENCE—13 ELIZ. c. 5.] Whether or not 13 Eliz. c. 5 (which may not extend to or operate in the Mofussil in *India*) is more than declaratory of the common law so far as it avoids transactions intended to defraud creditors, there seems to be no doubt that its principles and the principles of the common law for avoiding fraudulent conveyances have been given effect to by the High Courts of *India*, and have properly guided their decisions in administering law according to equity and good conscience:—*Held*, on the evidence, that the heba in the cause was a covinous instrument, not made *bonâ fide* or on any good

COVINOUS INSTRUMENTS VOID IN EQUITY AND GOOD CONSCIENCE—*continued.*

consideration, and was one by which creditors had been delayed in their just rights (the intention of the settlor being to protect his property from those who were his creditors at the time); and that the same according to equity and good conscience was fraudulent and void as against creditors. ABDOOL HYE *v.* MIR MOHAMED MOZUFFER HOSSEIN - - - - - 10

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DEPOSIT OF WILL: *See* ACT I. OF 1869.

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EXECUTION.] The Plaintiffs having recovered a money decree against *M.'s* widow for the wrongful conversion of their timber by *M.*, attached in execution the property of the Defendant *M.'s* brother, and upon such attachment being disallowed sued to establish their right to execution against the detached property upon the ground that the Defendant had benefited by the timber taken by *M.* and after *M.'s* death had sold the same and appropriated the money:—*Held*, that the Plaintiffs had a right to follow the proceeds of the timber, and that the Defendant having received the money and not having paid it over to *M.'s* widow, they had a right to recover the amount from him:—*Held*, with regard to limitation, that under Act IX. of 1871, art. 118, the Plaintiffs had a right at any time within six years from the time when the Defendant received the money, to hold him responsible to them for the amount. GOOROO DAS PYNE *v.* RAM NARAIN SAHOO - - - - - - - - 59

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FORMAL OBJECTION AS TO AUTHORITY OF PLAINTIFF'S NEXT FRIEND: *See* PRACTICE. 2.

FRAUD.] Where deeds of hypothecation and sale are ordered to be set aside on the ground of collusion between the grantor's manager and the lender, *held*, that the condition of cancelling the deeds should be, not the repayment of moneys proved to have been received by the manager, but of sums shewn to have been actually paid to the grantor personally, or borrowed by the manager in the course of a prudent management of the estate. RAJA AJIT SINGH *v.* RAJA BIJAI BAHADUR SINGH - - - - - - - 211

GIFT.] Case in which it was *held* that *H.* having by a valid verbal gift (followed by delivery of possession) divested himself of all his interest in certain property in favour of his wife and her children, could not afterwards annex a condition thereto, and even if he could, the condition, if immoral, would be void, and could not invalidate the gift. RAM SARUP *v.* MUSSUMAT BELA - 44

GIFT TO GRANDCHILDREN WITH SON'S CONSENT: *See* HINDU LAW. 2.

GIFT TO UNBORN PERSONS: *See* HINDU LAW. 2.

HINDU LAW (MITAKSHARA). *Held*, on the evidence in the case, that the raj in question was an ancient raj and an ancestral estate, and that by virtue of an ancient custom in the family it was impartible.—According to the Mitakshara the estate being ancestral and the family undivided, the Plaintiff as the nearest male heir of the deceased Rajah and the surviving member of the undivided family was entitled to succeed to the raj in preference to the widow.—A female cannot inherit an impartible ancestral estate belonging to a joint Hindu family governed by the Mitakshara when there are any male members of the family who are qualified to succeed as heirs.—*Maharani Hiranath Koer* v. *Baboo Ram Narain Singh* (9 Beng. L. R. 274) approved.—*Held*, in this case, that such law was not shewn to have been modified by an ancient uniform custom in favour of the widow.—An ancestral estate even though impartible is not the separate or self-acquired estate of the single member upon whom it devolves so long as the family continues joint.—*Chintamun Singh* v. *Mussumut Nowlukho Kowari* (Law Rep. 2 Ind. Ap. 263) approved. RAJAH RUP SINGH *v.* RANI BAISNI AND THE COLLECTOR OF ETAWAH. - - - - - - - 149

2. —— A deed of gift by a Hindu (Mitakshara) of his ancestral immoveable estate (the family being joint) in favour of the children of *U.* his only son, who consented thereto, was followed by mutation of names in favour of the only one of such children then born, under the guardianship of his mother. Both grandfather and grandchild died. In a suit by a judgment creditor of *U.* against the mother and heiress of the donee to avoid the said deed and to make the land comprised therein available to answer *U.'s* debts —*Held*, that the deed having been made on good consideration and in good faith was valid, whether or not *U.'s* creditors were unpaid:—*Held*, further, that the deed, expressed to be in favour of children some of whom were unborn, was not on its true construction a gift to a class, void as to all, because inoperative as to some. If the donee's possible brothers are unable to take by virtue of the gift, the donee shall take the whole by virtue of the family arrangement, evidenced by the deed and acts done under the deed; in any event the property in suit effectually passed away from the grandfather and *U.* RAI BISHEN CHAND *v.* MUSSUMAT ASMAIDA KOER - - - 164

3. —— Where by the terms of her husband's will a Hindu widow is the full representative of his estate; *held*, that a decree against her declaring that the will was revoked, and that the

HINDU LAW (MITAKSHARA)—*continued.*

Appellant was entitled to succeed *ab intestato*, bound the Respondent whose claim was by appointment from the widow under the will, whether or not he was a party to the suit in which the decree was made.—*Quære*, whether the Respondent who had been as a minor made a party and personally served with a summons in the original suit, and who, having attained his majority and as transferee of the estate from the widow, prosecuted the appeal to Her Majesty in Council, should be deemed a party thereto and bound as a party by the final order of Her Majesty in Council.—Where a manager has been appointed under the *Oudh Talukdars' Relief Act*, *held*, that sect. 25 does not render a judgment in a suit relating to succession void, as between the parties contesting the right to succession, merely because the manager has not been made a party to the suit. PERTAB NARAIN SINGH *v.* THILOKINATH SINGH [197

4. —— Indefinite words of gift are calculated to convey all the interest of the grantor, but it is necessary to read the whole instrument to gather the intention.—Where the words in a deed (ikrarnama), "I put a stop to my interest" (in those taloeks) "and withdraw my enjoyment thereof, and I make them over to you," are preceded by "in order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support by having the property under your authority and control":—*Held*, that the indefinite words of gift must be limited by the purpose of the gift, and that it was the donor's intention that the donee should take the property only for life.—By Hindu law a gift of property, whether movable or immovable, may operate, where no question of resumption arises, to give to the donee a right to obtain possession; and it is not invalid by reason of its not being immediately followed by possession.—Where a donor has done all she can to complete the gift, is a party Defendant to the suit to set it aside, brought by a Plaintiff claiming adversely to both parties thereto, and admits the gift to be complete:—*Held*, that such a gift cannot be set aside as utterly invalid, because the donor was out of possession, and no possession was ever given to the donee. RALI DAS MULLICK *v.* KANHYA LAL PUNDIT - - - - 218

HINDU WIDOW.] By Hindu law the husband's estate vests in his widow absolutely for some purposes, though in other respects for a qualified interest.—When a Hindu's widow's right, title, and interest is sold in execution of a decree, the Court is at liberty to look to the judgment to ascertain what was sold thereunder.—Where it appeared from the judgment that the decree against the widow was in respect of the husband's estate, and bound the reversionary heir, *held*, that the purchaser of her right and interest in execution took the estate absolutely. GOOROO DAS PYNE *v.* RAM NARAIN SAHOO - - 59

JURISDICTION *See* FINAL ORDER IN EXECUTION PROCEEDINGS

LEGITIMACY. *See* MAHOMEDAN LAW.

LIMITATION.] Under *Limitation Act* XV., of 1877, sched. II., art. 109, mesne profits can only be recovered for the three years next before the filing of the plaint.—*Held*, that the Defendant, who had only come into possession of the estate in suit on its being released from the charge of a superintendent appointed under Act XXIV. of 1870, could not be charged with sums which might have been received by the superintendent but for his wilful default.—There being no rule of law obliging the Court to allow interest upon mesne profits, the discretion of the lower Courts in refusing interest was not interfered with. KISHNA NAND *v.* KUNWAR PERTAB NARAIN SINGH [88

—— *See* EXECUTION.

MAHOMEDAN LAW.] Case in which it was held that an acknowledgment and recognition by a Mahomedan of his son, with a view to give him the *status* of son capable of inheriting was sufficient to enable him to succeed as heir.—*Quære*, if the son had been shewn to have been the offspring of adulterous intercourse, that is if his mother had been previously thereto married to another man then and still living, would such acknowledgment and recognition have availed to legitimate him. SYED SADA KUT HOSSEIN *v.* SYED MAHOMED YUSOOF - - - - - 31

MESNE PROFITS: *See* LIMITATION.

MORTGAGE.] The purchaser of an equity of redemption in reference to immovable property situated in the *Hyderabad* Assigned Districts, paid off the first mortgage thereon with notice of a second mortgage:—*Held*, that he must be assumed, according to the rule of justice, equity, and good conscience there applicable, to have intended to keep the first mortgage alive, and that therefore he was entitled to stand in the place of the first mortgagee and to retain possession against the second mortgagee until repayment.—The doctrine laid down in *Toulmin* v. *Steere* (8 Mer. 210), that the purchaser of an equity of redemption cannot set up a mortgage which he has got in against subsequent incumbrances of which he had notice, is not to be regarded as a rule of justice, equity, and good conscience, and therefore cannot be applied to such Indian transactions as are governed by that rule. GOKULDASS GOPALDASS *v.* RAMBUX SEOCHAND - - - - - - 126

2. —— In foreclosure proceedings under Regulation XVII. of 1806, the provisions of sect. 8 must be strictly observed. They are not merely directory, but prescribe conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor.—*Norender Narain Singh* v. *Dwarka Lal Mundur and Others* (Law Rep. 5 Ind. Ap. 18) followed.—An admission in the pleadings that some notice of foreclosure had been received, coupled with an omission to raise any issue as to its validity, does not preclude a defendant from questioning such validity in appeal.—Where it appeared that the notification served upon the Defendant was not a perwannah under the seal and official signature of the Judge, did not notify from what date the year of redemption began to run, and was not and did not purport to be a copy of the petition for foreclosure;

MORTGAGE—*continued.*

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OUDH ESTATES ACT (I. OF 1869).] *Held*, that where a talukdar's name is entered in the second list prepared under Act I. of 1869, and not in the third, the estate, although it is to descend to a single heir, is not to be considered as an estate passing according to the rules of lineal primogeniture. ACHAL RAM *v.* UDAI PARTAB ADDIYA DAT SINGH - - - - - - - 51

OUDH INCUMBERED ESTATES ACT.] *Held*, that a mortgage bond which contains no personal contract to pay out of the mortgagor's personal estate, but is a mere contract to pay out of the hypothecated taluka, which at the date of the bond was under the operation of the *Incumbered Estates Act* (XXIV. of 1870), is invalid under sect. 4, cl. 3. NABOTAM DAS *v.* SHEO PARGASH SINGH - - - - - - - - 83

—— *See* HINDU LAW. 3.

POWER OF ATTORNEY.] A power of attorney gave to the holders authority "for the purposes aforesaid to sign for me and in my name and on my behalf any and every contract or agreement, acceptance, or other document," the purposes aforesaid being "from time to time to negotiate, make sale, dispose of, assign, and transfer" Government promissory notes, and "to contract for, purchase, and accept the transfer" of the same:—*Held*, that upon the true construction of this power the holders were authorized to sell or purchase such notes, but not to pledge them.—*Bank of Bengal* v. *Macleod* (5 Moore, Ind. Ap. 1; 7 Moore, P. C. 35) distinguished. JONMENJOY COONDOO *v.* WATSON - - - - - 94

POWER TO SELL OR PURCHASE DOES NOT INCLUDE POWER TO PLEDGE: *See* POWER OF ATTORNEY.

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2. —— The right, title, and interest under Mitakshara law of a father in the joint family estate having been attached in execution of a decree for money and sold, *held*, that the purchaser took the right which the father would have had to a partition, and the share which would have come to him on a partition being made.—The Court of Wards having appointed a manager on behalf of the infant Plaintiff, *held*, that the Plaintiff having a right to sue, any objection to

PRACTICE—*continued.*

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PRINCIPAL AND AGENT; *See* POWER OF ATTORNEY.

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—— *See* FINAL ORDER IN EXECUTION PROCEEDINGS.
SUIT TO SET ASIDE SALE IN EXECUTION.

REGULATION XVII. OF 1806, s. 8: *See* MORTGAGE. 2.

RES JUDICATA: *See* HINDU LAW. 3.

—— A Judge having decided in the course of execution proceedings that the decree according to its true construction awarded future mesne profits, *held* that such decision having been or become final was binding between the parties, and could not in a later stage of the execution proceedings be set aside and future mesne profits be disallowed.—The binding force of such a decision depends upon general principles of law and not upon sect. 13, Act X. of 1877. RAM KIRPAL SHUKAL *v.* MUSSUMAT RUP KUARI 37

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SUIT TO SET ASIDE SALE IN EXECUTION.] Case where a sale in execution was ordered to be set aside, it appearing that a consent petition for postponement had been on the day of sale, by mistake of the judgment debtor, presented to the wrong Court, and that the decree holder had in the absence of the judgment debtor allowed the sale to proceed, and himself had become the purchaser. GUNGAPERSHAD SAHU *v.* GOPAL SINGH - - - - - - - 234

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